EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 7889

Vol 1906

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

KATIE M. EUSTACE, ETC.

Alleged Bankrupt.

KATIE M. EUSTACE and CHAS. W. FOURL,

Appellants,

vs.

E. A. LYNCH,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Solicitors.

For Appellant Katie M. Eustace:

HIRAM E. CASEY, Esq.,

Rowan Building,

Los Angeles, California.

For Appellant Charles W. Fourl:

EDWARD W. TUTTLE, Esq.,

Detwiler Building,

Los Angeles, California.

HIRAM E. CASEY, Esq.,

Rowan Building,

Los Angeles, California.

For Appellee:

RAPHAEL DECHTER, Esq.,

Stock Exchange Building,

Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF	)	
	)	
Katie M. Eustace, etc.,	)	
	)	
Alleged Bankrupt.	)	
	)	
E. A. LYNCH, Receiver of Katie M. Eustace, etc.,	)	No. 23770-C
	)	CITATION ON APPEAL
Petitioner	)	
	)	
vs.	)	
	)	
CHAS. W. FOURL,	)	
	)	
Respondent.	)	

UNITED STATES OF AMERICA, SS.

To E. A. Lynch, Alleged Receiver in bankruptcy in the above entitled matter and to his attorney, Raphael Dechter:

GREETINGS:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 24th

day of October, 1934, pursuant to an Order Allowing Appeal, filed in the Clerk's office of the District Court of the United States, in and for the Southern District of California, Central Division, in that certain case entitled "In the Matter of Katie M. Eustace, etc., Alleged Bankrupt," No. 23770-C, wherein E. A. Lynch is petitioner, pursuant to petition and order to show cause thereon, dated and filed September 11, 1934, wherein Chas. W. Fourl is appellant and you are ordered to show cause, if any there be, why the Order and Judgment in the said *cas* mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave, United States District Judge for the Southern District of California, this 24th day of September, A. D. 1934, and of the Independence of the United States, the one hundred and fifty-eighth.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Received copy of the within Citation on Appeal this 24 day of Sept. 1934 R. Dechter Attorney for Receiver & Court. Filed R. S. Zimmerman, Clerk at 7 min. past 2:00 o'clock Sep. 24, 1934 P. M. By L. B. Figg, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF Katie M. Eustace, etc., Alleged Bankrupt	
E. A. LYNCH, Receiver of Katie M. Eustace, etc., Petitioner, vs. KATIE M. EUSTACE, Respondent.	No. 23770-C CITATION ON APPEAL

UNITED STATES OF AMERICA, SS.

To E. A. Lynch, Alleged Receiver in bankruptcy in the above entitled matter and to his attorney, Raphael Dechter:

GREETINGS:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th

day of October, 1934, pursuant to an Order Allowing Appeal, filed in the Clerk's office of the District Court of the United States, in and for the Southern District of California, Central Division, in that certain case entitled "In the Matter of Katie M. Eustace, etc., Alleged Bankrupt," No. 23770-C, wherein E. A. Lynch is petitioner, pursuant to petition and order to show cause thereon, dated and filed September 11, 1934, wherein Katie M. Eustace is appellant and you are ordered to show cause, if any there be, why the Order and Judgment in the said case mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave, United States District Judge for the Southern District of California, this 1st day of October, A. D. 1934, and of the Independence of the United States, the one hundred and fifty-eighth.

Geo. Cosgrave

United States District Judge.

[Endorsed]: Received copy of the within citation this ..... day of October, 1934 R. Dechter Attorney for Petitioning Creditor & Receiver. Filed R. S. Zimmerman, Clerk at 20 min. past 2:00 o'clock Oct-2, 1934 P. M. By Theodore Hocke, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of	)	
	)	No. 23770-C
KATIE M. EUSTACE, doing business as EUSTACE PLUMBING COMPANY,	)	INVOLUNTARY
	)	PETITION IN
	)	BANKRUPTCY
Alleged Bankrupt	)	
	)	

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT:

The petition of OIL TOOL EXCHANGE, INC., a corporation, SPEIRS & MEADOWS, a copartnership, and A. M. KUPFER respectfully shows as follows:

I.

That KATIE M. EUSTACE is engaged in the plumbing business, doing business as EUSTACE PLUMBING COMPANY, and has for the greater portion of six months next preceding the date of the filing of this petition had and now has her principal place of business at 1246 East Ninth Street, in the City of Los Angeles, County of Los Angeles, State of California, and in the above District, and owes debts in excess of One Thousand Dollars ($1,000.00), and is a commercial company, to-wit: engaged in the plumbing business.

II.

That your petitioners are creditors of said alleged bankrupt, having provable claims amounting in excess of securities held by them to more than the sum of Five Hundred Dollars ($500.00); that the nature and amount of your petitioners' claims are as follows:

That the claim of the Oil Tool Exchange, Inc., a corporation, is based upon a judgment recovered in the Superior Court of Los Angeles County for the sum of $6284.02, in action No. 366483, entitled, "Oil Tool Exchange, Inc., vs. A. M. Kupfer, K. Eustace, et al."

That the claim of Speirs & Meadows is based upon a judgment in the sum of $650.00 recovered against said alleged bankrupt.

That the claim of A. M. Kupfer is for a judgment for costs recovered against said alleged bankrupt in the sum of $49.95.

III.

That within four months last past and within four months next preceding the filing of this petition in bankruptcy, and while insolvent, the bankrupt suffered and committed the Oil Tool Exchange, Inc., to obtain through legal proceedings a judgment lien on real estate belonging to and standing in the name of the alleged bankrupt, to-wit, on April 24, 1934, and failed and neglected within thirty days from the date of said judgment lien was obtained to vacate or discharge the same.

That within four months preceding the filing of this petition and while insolvent and with intent to prefer Charles W. Fourl and I. Henry Harris over her other creditors, said alleged bankrupt did cause to be transferred to said Charles W. Fourl and I. Henry Harris a certain oil and gas leasehold in the Baldwin Hills, Los Angeles County.

That within four months preceding the filing of this petition in bankruptcy, and while insolvent, and with intent to hinder, delay and defraud her creditors, said alleged bankrupt caused to be transferred and concealed in the name of one G. Dibetta certain real estate situated at Huntington Beach, Orange County, California.

WHEREFORE, your petitioners pray that service of this petition, with a subpoena, may be made upon said alleged bankrupt as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged by the Court to be a bankrupt within the purview of said Acts.

OIL TOOL EXCHANGE, INC.

By B. A. Coates

SPEIRS & MEADOWS

By O. J. Meadows

By A. M. Kupfer

Petitioners.

R Dechter

Attorney for Petitioners

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA) ss
CENTRAL DIVISION)

B. A. COATES, office manager of OIL TOOL EXCHANGE, INC., one of the petitioners above named, does hereby make solemn oath that the statements contained in the foregoing petition, subscribed by petitioner, are true.

B. A. Coates.

Subscribed and sworn to before me this 22 day of August, 1934.

[Seal] Raphael Dechter

Notary Public in and for the County of Los Angeles, State of California

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA) ss
CENTRAL DIVISION)

O. J. Meadows, one of the co-partners of SPEIRS & MEADOWS, one of the petitioners above named, does hereby make solemn oath that the statements contained in the foregoing petition, subscribed by petitioner, are true.

O. J. Meadows.

Subscribed and sworn to before me this 22 day of August, 1934.

[Seal] Raphael Dechter

Notary Public in and for the County of Los Angeles, State of California

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA) ss
CENTRAL DIVISION)

A. M. KUPFER, one of the petitioners above named, does hereby make solemn oath that the statements contained in the foregoing petition, subscribed by petitioner, are true.

A. M. Kupfer

Subscribed and sworn to before me this 23 day of August, 1934.

[Seal] Raphael Dechter

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27 min. past 4 o'clock Aug. 23, 1934 P. M. By L. B. Figg Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPOINTMENT OF RECEIVER.

The petition of A. M. KUPFER respectfully shows as follows:

I.

That he is one of the petitioning creditors in the above entitled matter; that it is absolutely necessary for the preservation of the estate that a Receiver be appointed for the following reasons: That said Katie M. Eustace has for a long time past been engaged in the plumbing business under the name of Eustace Plumbing Company; that said alleged bankrupt has been the manager and operator of said business; that said alleged bankrupt has stored a large amount of miscellaneous plumbing supplies, fittings, etc., at 1246 East Ninth Street, in the City of Los Angeles, and also at 166½ No. La Brea and 828-30 Ceres Avenue, Los Angeles; that said bankrupt plans and intends to dispose of and conceal such stock of plumbing supplies so as to avoid her creditors from securing the benefit of the same as assets of the above estate; that said bankrupt, for the purpose of hindering, delaying and defrauding her creditors, has for some time past been concealing in the names of dummies other real and personal property; that the approximate value of such business and property is the sum of $10,000.00.

II.

That it is for the best interests of the above estate that a Receiver, if appointed, be authorized to continue the business of the bankrupt until the appointment of a

Trustee, for the reason that said business will be of great value to the creditors as a going concern.

WHEREFORE, your petitioner prays the Court for an order appointing Receiver herein and authorizing and directing him to receive the assets belonging to the above estate and to conduct the business of the bankrupt.

A. M. Kupfer
Petitioner

United States of America)
Southern District of California) ss
Central Division)

A. M. KUPFER being by me first duly sworn, deposes and says: that he is the petitioner in the above entitled action; that he has read the foregoing Petition For Appointment of Receiver and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

A. M. Kupfer

Subscribed and sworn to before me this 7 day of September 1934.

[Seal] Raphael Dechter
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 34 min. past 3 o'clock Sep. 7, 1934 P. M. By L. B. Figg, Deputy Clerk

[Title of Court and Cause.]

ORDER APPOINTING RECEIVER.

On verified petition duly filed, asking for the appointment of a Receiver in the above entitled matter, and it appearing satisfactorily therefrom that it is absolutely necessary for the preservation of the assets of said bankrupt that a Receiver should be appointed, upon motion of RAPHAEL DECHTER, Attorney for said petitioners,

IT IS ORDERED THAT E. A. Lynch of Los Angeles, California, be and he is hereby appointed Receiver of all property of whatsoever nature and wheresoever located, now owned by or in the possession of said bankrupt, and of all and any property of said bankrupt and in possession of any agent, servant, officer or representative of said bankrupt, care for, inventory, insure, segregate and move all assets of said bankrupt until the appointment and qualification of the Trustee herein, and with the further authority to collect such accounts receivable as are due to said estate and with further authority to conduct the business and sell the same as a going concern, if it can be done with benefit to said estate, and said Receiver is authorized to do all and any such acts and take all and any such proceedings as may enable him forthwith to obtain possession of all and any such property; and

IT IS FURTHER ORDERED THAT THE DUTIES AND COMPENSATION of said Receiver are hereby specifically extended beyond those of a mere custodian within the meaning of Section 48 of the Bankruptcy Act to embrace the conduct of the business and

marshalling of assets, preparation of inventories, collection, sale and disposition of accounts and notes receivable, and conduct of business of said bankrupt as hereinabove specifically authorized, and

IT IS FURTHER ORDERED that all persons, firms and corporations including said bankrupt, and all attorneys, agents, officers and servants of said bankrupt forthwith deliver to said Receiver all property of whatsoever nature and wheresoever located, including merchandise, accounts, notes and bills receivable, drafts, checks, moneys, securities and all other choses in action, account books, records, chattels, lands and buildings, life and fire and all other insurance policies in the possession of them or any of them, and owned by said bankrupt, and said bankrupt is ordered forthwith to deliver to said Receiver all and any such property now in the possession of said bankrupt; and

IT IS FURTHER ORDERED that all persons, firms and corporations, including all creditors of said bankrupt, and representatives, agents, attorneys and servants of all such creditors, and all sheriffs, marshal/s, and other officers, and their deputies, representatives and servants are hereby enjoined and restrained from removing, transferring, disposing of or selling or attempting in any way to remove, transfer or dispose of, sell or in any way interfere with any property, assets or effects in possession of said bankrupt or owned by said bankrupt, and whether in possession of any officers, agents, attorneys or repre-

sentatives of said bankrupt, or otherwise and all said persons are further enjoined from executing or issuing or causing the execution or issuance or suing out of any Court of any writ, process, summons, attachment, replevin, or any other proceeding for the purpose of impounding or taking possession or or interfering with any property owned by or in possession of said bankrupt or owned by said bankrupt, and whether in possession of any agents, servants or attorneys of said bankrupt, or otherwise; and

IT IS FURTHER ORDERED that the said Receiver is directed and authorized, as provided under the Postal Laws and Regulations of the United States, to receive all mail matters addressed to the above named bankrupt; and

IT IS FURTHER ORDERED that before entering upon his duties, said Receiver shall furnish a bond conditioned for the faithful performance of his duties, with a good and sufficient surety or sureties, in the sum of $5000.00.

Petitioning creditors to file a bond of $500.00

DATED: This 7th day of September 1934

Geo. Cosgrave
District Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 34 min past 3 o'clock Sep. 7, 1934 P. M. By L. B. Figg, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION OF RECEIVER FOR AN ORDER TO SHOW CAUSE IN RE CONTEMPT AND RESORATION OF POSSESSION.

E. A. Lynch, Receiver in bankruptcy herein respectfully petitions the court as follows:

I.

That he is the duly appointed, qualified and acting receiver in Bankruptcy herein.

II.

That immediately upon his qualifying as receiver herein your receiver on September 10th at 11:45 A. M. went to the premises at which the above named bankrupt is conducting her business, to wit: 1246 East 9th Street in the city of Los Angeles, California; that your receiver went to the said premises accompanied by J. C. Keenan and W. D. Hunt; that your receiver found in charge of said premises J. G. Stevenson, who advised your receiver that he had been working for the said alleged bankrupt for a period of seventy weeks; that the bankrupt during all of said time had been conducting said business as far as said employee had observed; that as far as said employee knew said alleged bankrupt was the owner of said business and that he has received his compensation during all of said seventy weeks of employment at said premises from said alleged bankrupt; that your receiver left with said employee a certified copy of the order appointing your petitioner as receiver; that about 12 o'clock noon the bankrupt appeared in the presence of Charles M. Fourl, an attorney; that said

bankrupt and said Charles M. Fourl, attorney advised your receiver that said premises and said business was owned by John M. Eustace and ordered said receiver to quit said premises, claiming that he was an interloper and trespasser; that your receiver communicated with Raphael Dechter, the attorney for the petitioning creditors and was advised by said Raphael Dechter that if said bankrupt was in possession of the premises or in control of the premises that your petitioner as receiver succeeded to such possession and control, and if anybody else desired to obtain possession of said premises to instruct them to file a petition in the above entitled court for such purpose; that your receiver transmitted such advice and instructions to said alleged bankrupt and said Charles M. Fourl; that said bankrupt continuously threatened and ordered your receiver to quit said premises and stated that she was going to use all kinds of force to evict said receiver; that while your receiver was in charge of said premises said Katie M. Eustace appeared to be the only person who answered any telephone calls to transact any business and she ordered orders filled that she received over the telephone from a branch store at 166½ No La Brea and from other persons unknown to your receiver; that said bankrupt stated to your receiver that she would not hesitate to use a gun if necessary to evict said receiver; that in said premises there was a locked room in which your receiver was advised was the records and books of said business; that said bankrupt refused to surrender the keys to said locked storeroom to your receiver; that in the presence of your receiver said bankrupt opened said locked storeroom with keys in her possession but barred any access to said

room by your receiver; that about 5:45 p. m. on September 10th, 1934, said bankrupt called her attorney of record Hiram E. Casey and after talking with said Hiram E. Casey requested your petitioner as receiver to talk to Mr. Casey; that your receiver talked with said attorney, Mr. Casey and said attorney told your receiver that he was a trespasser and interloper and that he was going to advise the alleged bankrupt to use all force necessary to evict him from said premises; that your receiver advised Mr. Casey that he would call his counsel; but said Mr. Casey instructed Mrs. Eustace to refuse to permit your receiver to use said telephone and stated that he could go outside and use a telephone; that said Charles M. Fourl and Katie M. Eustace refused to permit your receiver to use said telephone and thereafter forcibly and violently evicted your receiver from said premises and forcibly resisted any attempts on the part of your receiver to re-enter said premises; that said Katie M. Eustace herself locked the door in the face of your receiver with the keys that she had in her possession at all times on said 10th day of September, 1934.

WHEREFORE your petitioner prays for an order to show cause directed to said Katie M. Eustace and said Charles M. Fourl directing each of them to show cause why they should not be held in contempt of court for interferring with the possession of the receiver of said premises and why possession of said premises should not be restored forthwith to your receiver.

E. A. Lynch

Receiver.

United States of America (
Southern District of California (SS
Central Division (

E. A. Lynch being by me first duly sworn, deposes and says: that he is the Receiver in bankruptcy in the above entitled action; that he has read the foregoing Petition for an order to show cause and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

E. A. Lynch

Subscribed and sworn to before me this 11 day of Sept. 1934.

[Seal] Raphael Dechter

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed R. S. Zimmerman Clerk at 58 min past 10 o'clock Sep. 11, 1934 A. M. By L. B. Figg Deputy Clerk

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the petition of E. A. Lynch, Receiver herein, and good cause appearing therefor,

IT IS ORDERED that KATIE M. EUSTACE and CHARLES M. FOURL be and each of them is hereby directed to appear in the Court Room of Hon. George Cosgrave, in the Federal Building, Los Angeles, California on the 12th day of September, 1934, at the hour of 2 o'clock P. M., then and there to show cause, if any they or either of them, has why an order should not be made declaring them in contempt of court for interferring with the possession of the receiver herein of the premises at 1246 East 9th Street, Los Angeles, California, and why an order should not be made restoring possession forthwith of said premises to your receiver, and why an order should not be made restraining them from interferring with the possession of your receiver of said premises.

Dated September 11, 1934.

Geo. Cosgrave

Judge.

Time for service of this order is hereby shortened to 1 day.

Geo. Cosgrave

Judge.

[Endorsed]: Filed R. S. Zimmerman Clerk at 55 min past 11 o'clock Sep. 11, 1934 A. M. By L. B. Figg Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif., on Wednesday, the 12th day of September, in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable: GEO. COSGRAVE, District Judge.

In the Matter of	)	
	)	
Katie M. Eustace, etc.,	)	No. 23770-C Bkcy.
	)	
Alleged Bankrupt.	)	

This matter coming on for hearing on Petition filed Sept. 11, 1934 of E. A. Lynch, Receiver, for an order to show cause directed to Katie M. Eustace and Chas. M. Fourl in re contempt and restoration of possession; Raphael Dechter, Esq., appearing for the Trustee; Hiram E. Casey, Esq., appearing for the Alleged Bankrupt;

H. E. Casey, Esq., makes a statement and asks time to file pleading to Order to Show Cause; R. Dechter, Esq., makes a statement; H. E. Casey, Esq., orally demurs to the Order to Show Cause, which demurrer is overruled and exception noted, whereupon,

E. A. Lynch, Receiver, is called, sworn and testifies on direct examination by R. Dechter, Esq., and is cross-examined by H. E. Casey, Esq.;

Mrs. Katie M. Eustace is called, sworn and testifies for the Receiver on direct examination by R. Dechter, Esq., is cross-examined by H. E. Casey, Esq., testifies on redirect examination by R. Dechter, Esq., and in connection with her testimony the following exhibit is offered, admitted in evidence, and marked as follows, to-wit:

Receiver's Ex. 1: 5 Checks in blank, signed by Jos. A. Griffith;

Geo. H. Stephenson is called, sworn and testifies for the Receiver on direct examination by R. Dechter, Esq., and is cross-examined by H. E. Casey, Esq., whereupon,

The Receiver is instructed to take possession of the property, and the Court having stated that if there is any intereference with the Receiver, the Court will be inclined to be severe about it, Mrs. Eustace turns over the key to Receiver E. A. Lynch in open court, and Mr. Griffith having thereupon been instructed to turn over the books to Receiver Lynch, on motion of R. Dechter, Esq.; at the hour of 5:23 p. m. recess is declared.

[Title of Court and Cause.]

ORDER

The petition of E. A. Lynch, Receiver in Bankruptcy herein, and the order to show cause thereon directed to Katie M. Eustace and Charles M. Fourl, came on for hearing in the court room of the Honorable George Cosgrave, District Judge, on September 12th, 1934, at the hour of 2:00 o'clock P. M., E. A. Lynch, Receiver, appearing in person and by Raphael Dechter, attorney at law, and Katie M. Eustace appearing in person and by Hiram E. Casey, attorney at law, Charles M. Fourl not appearing, it appearing to the court that service was not effected upon such respondent, and the matter having been duly and regularly heard and submitted, the Court now finds as follows:

That E. A. Lynch was appointed as Receiver in Bankruptcy herein on September 7, 1934, and duly qualified as such Receiver on September 10, 1934; that on September 10, 1934, at 11:45 A. M. said Receiver went to the premises at which the above named bankrupt was carrying on business, to-wit, 1246 East 9th Street, in the City of Los Angeles; that said Receiver was accompanied by J. C. Keenan and W. D. Hunt at said time; that upon arrival at said premises said Receiver found in charge of said premises one J. G. Stevenson, who had been working for the alleged bankrupt for a period of seventy weeks; that the bankrupt for approximately seventy weeks prior to the appointment of said Receiver had in her possession the keys to said premises, the management of said business, and direction of said business; that said J. G. Stevenson was employed by said

Katie M. Eustace and received his compensation from said Katie M. Eustace; that in the operation of said business said Katie M. Eustace carried the bank account of the business in the name of the bookkeeper, J. A. Griffith, in which bank account she caused to be deposited the income from said business; that said J. A. Griffith would sign checks in blank and deliver the same to the bankrupt for use by her, if she saw fit; that at the time of the hearing of the order to show cause herein the said bankrupt had in her possession five checks signed by said J. A. Griffith on the Hancock Park Branch of the California Bank of Los Angeles, which said checks were undated and not filled in, with the exception of the signature of said J. A. Griffith; that said bank account was used by said bankrupt for her personal use, such as the payment of personal expenditures; that a certified copy of the order appointing the Receiver was delivered by said Receiver to said J. G. Stevenson; that about 12:00 o'clock noon on September 10, 1934, the bankrupt appeared at the above address accompanied by said Charles M. Fourl, attorney at law; that said bankrupt and said Charles M. Fourl demanded and directed that said Receiver quit and abandon the possession of said premises; that said Receiver advised said bankrupt and said Charles M. Fourl that in view of the fact that the bankrupt was in control thereof that he as Receiver succeeded to such possession and control and that if she felt that the Receiver should not remain in possession of said premises that she should file her petition with the above Court;

that said bankrupt threatened and ordered said Receiver to quit said premises, notwithstanding such information by the Receiver; that said Receiver was barred from entrance to a room on the mezzanine floor on said premises to which the bankrupt had the keys; that said bankrupt refused to surrender said keys to the premises and to said locked storeroom on said mezzanine floor; that about 4:45 P. M. on September 10, 1934, said bankrupt called her attorney of record, Hiram E. Casey, and thereafter requested that the Receiver talk to said Hiram E. Casey; the Receiver did talk to said attorney, Hiram E. Casey, and said attorney advised said Receiver that he was going to instruct the bankrupt to use all force necessary to evict him from said premises; that the Receiver said he would thereupon call his attorney for advice and that said Hiram E. Casey thereupon instructed Mrs. Eustace, the alleged bankrupt, to prohibit the use of said telephone by the Receiver; that thereafter said bankrupt and said Charles M. Fourl refused to permit the Receiver to use the telephone on said premises and by force and violence ejected said Receiver from said premises and by their conduct demonstrated that they would violently and forcibly resist any attempt on the part of the Receiver to re-enter said premises; that said bankrupt personally locked the door in the face of said Receiver with the keys she had in her possession at the time of his eviction.

As conclusions from the foregoing findings of fact, the Court advises that at the time of the filing of the

petition in bankruptcy herein and at the time of the appointment of said Receiver that said Katie M. Eustace was in possession and control of the business being conducted at 1246 East 9th Street, Los Angeles; that the Receiver herein is entitled to the possession of said premises and the business conducted thereon.

IT IS THEREFORE ORDERED that said E. A. Lynch, as Receiver be, and he hereby is restored to the possession of said premises and the business conducted thereon at 1249 East 9th Street, Los Angeles, and that said bankrupt and any and all persons, their agents and employees are hereby restrained as more fully set forth in the order appointing Receiver from in any wise interfering with the possession of said Receiver.

IT IS FURTHER ORDERED that said alleged bankrupt, Katie M. Eustace, wilfully and deliberately violated the order of this Court appointing a receiver in bankruptcy herein and that said Katie M. Eustace committed a contempt by reason thereof of the above Court.

IT IS FURTHER ORDERED that further proceedings against said Katie M. Eustace be, and they hereby are suspended until a conclusion of the hearing against the respondent, Charles M. Fourl.

DATED: This 13th day of September, 1934.

Geo. Cosgrave
District Court Judge.

[Endorsed]: Filed R. S. Zimmerman Clerk at 59 min past 1 o'clock Sep. 13, 1934 P. M. By L. B. Figg Deputy Clerk.

[Title of Court and Cause.]

ANSWER OF RESPONDENT, CHAS. W. FOURL, TO PETITION AND ORDER TO SHOW CAUSE RE CONTEMPT.

Comes now Chas. W. Fourl, one of the respondents in the order to show cause in re contempt and restoration of possession, directed to Chas. W. Fourl and Katie M. Eustace, alleged bankrupt, dated and filed on Sept. 11, 1934, and signed by Honorable Geo. Cosgrave, District Judge, and makes answer to the petition of E. A. Lynch, alleged acting Receiver and to said order based thereon, and shows cause as follows:

I

That said petition and order do not, either singly or together, state facts sufficient to show or to constitute contempt on the part of this respondent.

II

That said petition and order do not, either singly or together, state facts sufficient to show or to constitute a criminal contempt on the part of this respondent.

III

That said petition and order do not, either singly or together, state facts sufficient to show or to constitute a civil contempt on the part of this respondent.

IV

That said petition and order, either singly or together, are not sufficient either in form or in substance to constitute a charge of criminal contempt against this respondent.

V

That said petition and order, either singly or together, are not sufficient in form to show or to advise this respondent whether it is intended to charge him with a civil or a criminal contempt.

VI

The order purporting to appoint said E. A. Lynch receiver does not purport to and does not in fact and in law authorize the said Lynch, as such alleged receiver, to take possession of property not owned by the alleged bankrupt, Katie M. Eustace, and does not and did not authorize or purport to authorize said Lynch to take possession of the plumbing business conducted under the name of the Eustace Plumbing Company, and did not and does not authorize or purport to authorize any of the acts of the said Lynch, alleged or referred to in the said petition for said order to show cause.

VII

This respondent denies that E. A. Lynch is the duly appointed receiver in bankruptcy in the above entitled matter. On the contrary respondent alleges that the order purporting to appoint said Lynch as receiver was made ex parte, without notice to the said alleged bankrupt or to any one and without any adjudication that said alleged bankrupt is in fact bankrupt, and upon a petition which does not state facts sufficient to warrant the appointment of a receiver ex parte or at all.

VIII

John M. Eustace and Katie M. Eustace, the alleged bankrupt, are and at all times mentioned herein and in

said petition were, and ever since 1904 have been husband and wife, and during all said period have resided in Los Angeles, California. For more than ten years prior to his said marriage to said Katie M. Eustace said John M. Eustace was engaged in the plumbing business both as a retailer and contracter. Said business was first located on Main Street in said City and then moved to No. 830 Ceres Avenue and in 1923 to 1246 East Ninth Street, in said City.

IX

The said wife has at all times since a year after her said marriage, actively worked with and for her husband in his said plumbing business, and during the past ten years he has been actively assisted therein by his son, John Eustace, Jr. Said business has been in part conducted at 1246 E. Ninth Street, Los Angeles, California, for the past eleven years; but in 1930 a second plumbing shop was opened by said John M. Eustace at 166½ North La Brea Avenue in said City in premises sublet to him by J. A. Griffith who held the lease covering said premises and subleases one-half thereof to said John M. Eustace, and who conducted his own real estate and insurance business in a part of said premises.

X

Said Katie M. Eustace does not and never has owned said plumbing business or had any interest therein except the community interest of a wife under the laws of California, nor has she ever been in possession thereof except as the wife and agent of her said husband, as herein set forth. The J. G. Stevenson mentioned in paragraph II of the said petition is a journeyman plumber who has

been employed as such in said business by John M. Eustace at various times, beginning in the year 1925.

This respondent has no knowledge of the alleged conversation between said Lynch and said Stevenson, nor of the alleged statements of the latter to said Lynch, set forth in paragraph II of said petition. But said Stevenson was at said time and place employed in part by said John M. Eustace in the capacity only of a journeyman plumber, and by this respondent as a mechanic to do mechanical work on valves and fittings belonging to this respondent and being prepared for use in this respondent's refinery under construction at Long Beach, California.

XI

This respondent likewise has no knowledge of what, if anything, was said by Raphael Dechter to said Lynch on the occasion mentioned in said paragraph II, but respondent denies that said Lynch transmitted to this respondent or to Katie M. Eustace any advice or instructions received from said Dechter.

This respondent did state to said Lynch at said time and place that he, respondent, was attorney for said John M. Eustace, that said John M. Eustace owned the said plumbing business, and that said Lynch was a trespasser; and this respondent at about 5:30 p. m. did tell said Lynch he would have to leave the premises since they were closing up. This respondent did not use either force or violence on said Lynch. This respondent is and has been for twenty-five years an attorney at law, and ever since the year 1911 has been and now is duly licensed to practice as such in the State of California.

This respondent has known said Lynch intimately for the past seven years, during which period the latter has been a professional trustee and receiver in bankruptcies, and during which period respondent has a number of times had business dealings and relations with said Lynch and when respondent informed said Lynch that the latter must leave the premises, when the same were closed up for the night, respondent placed his hand, at the request of said Lynch, on said Lynch's arm and together they walked out of the premises to the sidewalk, all without violence or force and in the most friendly spirit so far as respondent and said Lynch were concerned.

XII

Respondent denies that the alleged bankrupt, on the occasion or occasions mentioned in paragraph II of the said petition, continuously or at all threatened the said Lynch, and denies that the alleged bankrupt on said occasion or occasions stated that she was going to use all kinds of force to evict said Lynch, and denies that she stated she was going to use any force to evict said Lynch. Respondent denies that said Lynch, either as alleged receiver or otherwise was ever either in possession or in charge of the said plumbing shop. Respondent denies that said alleged bankrupt continuously ordered said Lynch to quit the said plumbing shop, but respondent admits that she did request said Lynch to leave the shop and did tell him that he was a trespasser; and in this connection respondent alleges upon information and belief that during the time said Lynch was in said shop said alleged bankrupt was advised, by telephone, by her attorney, that said Lynch was a trespasser in violation of the rights of her husband, John M. Eustace.

XIII

Respondent denies that said alleged bankrupt, during the period mentioned in paragraph II of the said petition, received any orders over the telephone and denies that she ordered such orders or any orders to be filled from a branch store or any store or at all.

Respondent denies that said alleged bankrupt stated to said Lynch or to any one, on the occasion or occasions mentioned in paragraph II of said petition, that she would not hesitate to use a gun if necessary to evict said Lynch.

XIV

Respondent has no knowledge as to what said Lynch was "advised" or told by any one present at said plumbing shop that said storeroom contained the books and/or records of said plumbing business. And respondent denies that the said storeroom was kept locked during the time that said Lynch and said alleged bankrupt were present in said shop. On the contrary respondent alleges that the said store room was left unlocked during said period.

XV

Respondent denies that said alleged bankrupt requested said Lynch "as receiver" to talk with Hiram E. Casey, her attorney. Respondent admits that said Lynch did talk with Mr. Casey over the telephone, but respondent has no knowledge as to what Mr. Casey told said Lynch. But respondent is informed and believes and therefore alleges that Mr. Casey did advise said Lynch that if he, Casey, were attorney for John M. Eustace, the husband of the alleged bankrupt and the owner of said plumbing business, that he, Casey, would advise said Eustace to

evict him, Lynch, as a trespasser; and upon information and belief respondent denies that said Casey told said Lynch that he, Casey, was going to advise said alleged bankrupt to evict him, Lynch.

XVI

Respondent denies that he forcibly or violently evicted said Lynch from the said plumbing shop and denies that he evicted said Lynch at all except as in this answer stated. And respondent denies that he forcibly resisted any attempts on the part of said Lynch to re-enter said shop. On the contrary respondent alleges that said Lynch made no efforts to and expressed no desire, by words or otherwise, to re-enter the shop. And respondent denies that said alleged bankrupt ever at any time touched said Lynch or requested this respondent to do so, and denies that she used any force or violence upon said Lynch, or that she locked the door in his face. The door was not locked until after the said Lynch was walking away to his automobile.

XVII

Respondent alleges that said Lynch knows and knew long before the commencement of the above entitled bankruptcy matter, that the said plumbing business belongs and belonged to John M. Eustace, the said husband of Katie M. Eustace and was and is familiar with the fact that at one time some years ago certain of the creditors of said John M. Eustace in the said plumbing business initiated an involuntary proceeding in bankruptcy against said Eustace in the above entitled ourt in which Hiram E. Casey was attorney for the petitioning creditors and in which said Lynch was an avowed aspirant for appoint-

ment as receiver or trustee in bankruptcy for said John M. Eustace, if a receiver or trustee were appointed.

XVIII

Respondent is informed and believes and upon such information and belief alleges further: that on September 10, 1934, at about 10:30 a. m. and after the alleged appointment of said Lynch as alleged receiver, and while said Hiram E. Casey was ignorant of said alleged appointment, said Casey casually met said Lynch on the street in Los Angeles, California, and thereupon said Lynch, knowing the above alleged connection of said Casey with the said bankruptcy proceedings against said John M. Eustace, stated to Casey that he, Lynch, was "going to crash" Katie M. Eustace, whereupon said Casey, ignorant as aforesaid of said appointment, immediately informed said Lynch that if he, Lynch, should be appointed receiver or get into the case he had better stay away from the said plumbing business, since he, Casey, knew from his said connection with the said previous proceedings against John M. Eustace, that Katie M. Eustace did not own the said business but that it was owned by her husband John M. Eustace and that there was on file in the county clerk's office a certificate of fictitious name showing said John M. Eustace to be the owner, and that he, Casey, was attorney for Katie M. Eustace, the alleged bankrupt. Said Lynch did not at said time advise or inform said Casey that he, Lynch, had secured an order purporting to appoint Lynch receiver.

WHEREFORE, this respondent respectfully prays that said petition and order to show cause be dismissed as to this respondent, and for such other and further relief as may be proper in the premises.

Edward W. Tuttle,
Attorney for Respondent,
Chas W. Fourl.

State of California }
County of Los Angeles } ss.

CHAS. W. FOURL being by me first duly sworn, deposes and says that he is one of the respondents in the above-entitled bankruptcy matter; that he has heard read the foregoing answer of Chas. W. Fourl, respondent and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Chas. W. Fourl

Subscribed and sworn to before me this 20th day of Sept. A. D., 1934.

[Seal] Edward W. Tuttle
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Sep. 21, 1934 - 12:12 P. M. R. S. Zimmerman Clerk By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of KATIE M. EUSTACE, etc., Alleged Bankrupt	No. 23770-C (In Bankruptcy)
E. A. Lynch, Receiver of Katie M. Eustace, etc., Petitioner, –vs– Charles W. Fourl and Katie M. Eustace, Respondents.	STATEMENT OF THE EVIDENCE BY CHARLES W. FOURL AND KATIE M. EUSTACE ON THEIR APPEALS FORM JUDGMENT AND SENTENCE FOR CONTEMPT

Be it remembered that on August 23, 1934, an involuntary petition in bankruptcy was filed against the above named Katie M. Eustace, upon which there has been no adjudication; that thereafter on September 7, 1934, an order was made ex parte without notice and based solely upon the original petition in bankrutpcy and the petition for such order filed September 7, 1934, appointing E. A. Lynch receiver of all property of the bankrupt.

Be it further remembered that on September 11, 1934, on petition of said E. A. Lynch, an order was made

directing said Katie M. Eustace and Charles W. Fourl to appear on September 12, 1934, and show cause why they should not be adjudged in contempt for interfering with the possession of said E. A. Lynch as receiver of the plumbing shop at 1246 East Ninth Street, Los Angeles, California, and why possession of the same should not be restored to said receiver.

Be it remembered that on the 12th day of September, 1934, at 2:00 P. M. thereof, the hearing on the said petition of the said E. A. Lynch was called, the petitioner being then and there represented by his attorney Raphael Dechter, at which time the said Raphael Dechter announced to the Court that the said petition and order to show cause had not been served upon the said Charles W. Fourl. The respondent, Katie M. Eustace, was present in Court and represented by her attorney, Hiram E. Casey. Upon the call of the matter, the said respondent, Katie M. Eustace, through her attorney, Hiram E. Casey, requested from the Court, two or three days time within which to prepare, serve and file a motion directed to the petition filed by the said E*a*. A. Lynch, which request was denied by the said Court. The said respondent, Katie M. Eustace, through her attorney, Hiram E. Casey, requested from the Court two or three days time within which to file an answer in writing to the said petition of the said E. A. Lynch, stating to the Court that the petition and order to show cause were a one-day petition and order and had just been served upon the respondent; that the said request was thereupon denied and an exception was taken by the said respondent to both the refusal of the Court of permission to file a motion and the refusal of the Court to permit the filing of a written answer to the said petition. That the Court

thereupon announced that it was busy in the trial of another matter pending before the Court and that upon the conclusion thereof during the said afternoon of the said 12th day of September, 1934, it would hear further from counsel.

Be it further remembered that at about 3:15 P. M. of the said 12th day of September, 1934, the aforesaid proceedings were again called by the Court, and that then and there the said Hiram E. Casey as counsel for the said Katie M. Eustace stated to the Court that he had not had time for preparation for trial of the said proceedings, and that he had not had time or opportunity to prepare and serve an answer in writing therein, and suggested to the Court that inasmuch as the proceedings against Charles W. Fourl in the above entitled Bankruptcy matter were of a similar nature as the proceedings against the respondent Katie M. Eustace, that it would seem advisable to continue the hearing as against Katie M. Eustace and consolidate it with the hearing to be had against Charles W. Fourl. The Court refused to accept the said suggestion and ordered the matter to proceed forthwith to trial as against Katie M. Eustace. The said Hiram E. Casey then requested a continuance of the said matter upon the grounds that he had not had time or opportunity to subpoena or procure witnesses necessary and material for the defense of the said Katie M. Eustace, then and there stating to the said Court that the witnesses he desired to subpoena and have present and testify were John M. Eustace, John Eustace, Charles W. Fourl, J. A. Griffiths and such other witnesses as might be necessary to controvert testimony offered by the petitioner with which the respondent disagreed. The Court then refused the request for con-

(Testimony of E. A. Lynch)

tinuance and ordered the trial to proceed, to which ruling an exception was taken by the said respondent. The said Hiram E. Casey thereupon made a request that a shorthand reporter or official court reporter be present to transcribe and preserve the record, proceedings and evidence to be offered or received in the proceedings. The Court then asked why a previous request had not been made for a court reporter when the case was first called. Mr. Casey replied that a request had been made at 2:00 o'clock to one of the Court attaches therefor; the Court ordered the matter to proceed without a court reporter, to which ruling an exception was taken by the respondent.

E. A. LYNCH,

the petitioner, called as a witness on his own behalf by his counsel Mr. Dechter, testified in the manner and to the effect as set forth in the Statement of Evidence on the Appeal of Charles W. Fourl, which said Statement by Stipulation and Order of Court thereon is adopted as part of the Statement of Evidence to be used on this appeal. That in addition to the testimony set forth in the Statement of Evidence in the said Charles W. Fourl appeal, the said E. A. Lynch on cross-examination stated that on the morning of September 10 he met Mr. Hiram E. Casey on Spring Street in Los Angeles about 10:30 A. M. thereof; that he stated to Mr. Casey that he had some information that he felt would give Mr. Casey a good laugh, and that Mr. Casey then asked him what it was, and Mr. Lynch replied that he was about to "crash" Katie M. Eustace in Bankruptcy, and that Mr. Casey

(Testimony of J. G. Stevenson)

then stated to him that he, Mr. Casey, was Katie M. Eustace's attorney, and that Mr. Casey then stated to him, if he expected to be Receiver, or ever became Receiver in the matter, not to bother the plumbing business on East Ninth Street, as that belonged to John M. Eustace and that Katie M. Eustace had no interest in it, and that Mr. Lynch stated to Mr. Casey that he had reason to believe that the contrary was true, and that Mr. Casey stated to him that among the records of the County Clerk's office a Certificate of doing business and fictitious name in compliance with the laws of the State of California was on file.

J. G. STEVENSON,

also called by Mr. Dechter as a witness on behalf of the petitioner E. A. Lynch, was duly sworn and testified that he was a plumber by trade and had been for many years; that he had been in the employ off and on of John M. Eustace as such for the past seven or eight years; that he was originally hired to work in the business of John M. Eustace by John M. Eustace personally; that he had been hired about two years ago by Katie M. Eustace for his present employment; that he knew Katie M. Eustace and saw her practically every day around the place of business at 1246 East Ninth Street and had been taking instructions from her since his last employment; that he had a key to the place of business at 1246 East Ninth Street; that his salary was handed to him sometimes in

(Testimony of J. G. Stevenson)

cash, sometimes by check signed by Mr. Griffith and sometimes it was handed to him by Katie M. Eustace and sometimes he paid himself from moneys on hand in the business and seldom saw Mr. Eustace around the business; that on the 10th day of September, 1934, he was present at the place of business at 1246 East Ninth Street; that at about 10:30 A. M., E. A. Lynch and two or three other men came into the storeroom of that business; that Mr. Lynch talked with him ten or fifteen minutes asking him questions concerning the business; that he thought Mr. Lynch was a prospective customer of the plumbing shop and treated him accordingly; that Mr. Lynch asked him if Mrs. Eustace owned the business and that he stated that Mrs. Eustace owned the business; that Mr. Lynch asked him if Mrs. Eustace paid him his salary and that he stated she did and that Mrs. Eustace was in charge of said business; that after Mr. Lynch *has* talked with him about fifteen minutes Mr. Lynch told the witness that he was there as Receiver in Bankruptcy of Katie M. Eustace and handed him a paper; the witness then stated that he placed the paper on the counter and that Mr. Lynch remained in the storeroom for an hour or so when Mr. Fourl and Mrs. Eustace came into the store. On cross-examination the witness stated that he did not know of his own knowledge who owned the business, and that if Mr. Lynch had asked him if John M. Eustace owned the business he would have answered yes, so far as he knew.

(Testimony of Katie M. Eustace)

KATIE M. EUSTACE,

respondent, called as a witness by Mr. Dechter, attorney for the petitioner, testified in part in the manner and to the effect as set forth in the Statement of Evidence as settled pursuant to Stipulation and Order of Court as set forth in the Charles W. Fourl appeal.

That in addition to the testimony as set forth in the aforesaid Statement of Evidence as settled in the Charles W. Fourl appeal, the said witness testified as follows:

Mr. Dechter asked the witness if she had any checks of the Eustace Plumbing Company. The witness replied she had one. Mr. Dechter asked if she had any checks signed in blank by J. A. Griffith. The witness opened her purse and produced a check payable to the Eustace Plumbing Company in a small sum of money, and also produced five blank checks signed, however, by J. A. Griffith, which said blank checks were on the Hancock Branch of the California Bank. The witness further testified that these checks were given to her by Mr. J. A. Griffith, the bookkeeper for Mr. Charles W. Fourl, to be used by her in making payments on materials and supplies purchased by her for Charles W. Fourl; that the money to cover the said checks was furnished by Charles W. Fourl to the said J. A. Griffith; that at times she had received blank checks from J. A. Griffith on this bank account which she filled in for her personal use, and at times they were filled in for the use of the payment of obligations

(Testimony of Katie M. Eustace)

of the Eustace Plumbing Company; that the money to cover the checks filled in by her for her personal use and for the payment of the obligations of the Eustace Plumbing Company was furnished by John M. Eustace. She further testified that John M. Eustace had been away from the plumbing business a greater portion of two years immediately preceding, and that she, with the assistance of their son, had been managing the business during said time; that the bank account of the Eustace Plumbing Company was carried in the name of J. A. Griffith, who kept the books of the bankrupt and the Eustace Plumbing Company; that said bank account was used by the bankrupt to pay her own personal obligations as well as the obligations of the Eustace Plumbing Company; that the income received by said bankrupt from the Eustace Plumbing Company and from the property belonging to the bankrupt, and other sources, was deposited in said bank account and was used for the purpose of paying her household bills, taxes and other expenses in connection with the property owned by the bankrupt; that said bankrupt was accustomed from time to time to receive checks signed by said J. A. Griffith in blank, which she filled in at her discretion; that at the time of the hearing in court she produced, upon demand by counsel for the court, five checks signed by J. A. Griffith in blank.

At 5:30 P. M. the Court announced that it would be compelled to take an adjournment and that further proceedings in the pending matter against Katie M. Eustace would be suspended until the termination on the Petition for Contempt of the hearing against Charles W. Fourl. The Court then adjourned.

Further proceedings were had in this matter on Saturday afternoon, September 22, at about 3:00 o'clock. The matter was called by the Court and in response thereto Mr. Casey as attorney for Katie M. Eustace called the Court's attention to the fact that an Order had been entered by the Court in this matter on the 13th of September, and that it was the understanding of Katie M. Eustace and her counsel that the matter had not been fully tried or submitted, but that the further hearing thereon was to await the termination of the hearing on the Charles W. Fourl contempt, and that in view of that fact, requested the Court to vacate its Order made on the 13th of September. Mr. Casey further stated that if the said Order of September 13, 1934, in the Katie M. Eustace matter was so vacated that then in that event on behalf of Katie M. Eustace he would stipulate that the evidence offered and received in addition to the evidence received in the Katie M. Eustace matter and the proceedings had in the Charles W. Fourl matter which had just been heard by the Court might be considered as having been offered and received in the Katie M. Eustace matter, with the further understanding that the said Katie

M. Eustace should have all the benefits of all the objections made of exceptions and all the rules and exceptions thereon. Counsel for Receiver and court stated that the matter as to Katie M. Eustace had been determined but notwithstanding was willing to make said stipulation. The said stipulation and offer was thereupon accepted by the petitioner and by the Court, and that thereupon the Court made its Order vacating and setting aside its former Order filed in this matter on the 13th of September, 1934. (Said order is part of the record on appeal herein.)

Thereupon the matter was submitted for decision. The Court then found the respondent, Katie M. Eustace, guilty of contempt and the matter was continued for sentence until Monday, September 24, at 11:00 A. M.

That pursuant to the Stipulation hereinbefore mentioned that the evidence offered and received and the proceedings had in the Charles W. Fourl matter which had been heard by the Court might be considered as having been offered and received in the Katie M. Eustace matter, the following additional and supplemental evidence and proceedings which were offered and received and had in the Charles W. Fourl matter were considered by the Court in this, the Katie M. Eustace matter, which said evidence offered and received and proceedings had are as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

IN THE MATTER OF Katie M. Eustace, etc., Alleged Bankrupt	
E. A. LYNCH Receiver of Katie M. Eustace, etc., Petitioner, vs. Charles W. Fourl, Respondent,	No. 23770-C STATEMENT OF THE EVIDENCE PROPOSED BY CHARLES W. FOURL ON HIS APPEAL FROM JUDGMENT AND SENTENCE FOR CONTEMPT

Be it remembered that on August 23, 1934 an involuntary petition in bankruptcy was filed against the above named Katie M. Eustace, upon which there has been no adjudication; that thereafter on September 7, 1934 an order was made ex parte without notice and based solely upon the original petition in bankruptcy and the petition for such order filed September 7, 1934, appointing E. A. Lynch receiver of all property of the bankrupt.

Be it further remembered that on September 11, 1934, on petition of said E. A. Lynch, and at the court's instance, an order was made directing said Katie M. Eustace and Charles W. Fourl to appear on September

12, 1934 and show cause why they should not be adjudged in contempt for interfering with the possession of said E. A. Lynch as receiver of the plumbing shop at 1246 East Ninth Street, Los Angeles, California, and why possession of the same should not be restored to said receiver.

Be it further remembered that said order was not served upon said Fourl and he was not present or represented at the hearing on said order on September 12, 1934, at which time the hearing thereon proceeded as to said Katie M. Eustace; that thereafter the time for hearing as to said Charles W. Fourl was fixed by the court for Friday, September 21, 1934, at the hour of 12:00 o'clock noon, and a copy of said order to show cause and the said petition of E. A. Lynch, was served upon and accepted by Edward W. Tuttle as counsel for said Fourl on September 19, 1934.

Be it further remembered that on September 21, 1934, at the hour of 12:00 o'clock noon, the said order to show cause came on for hearing before Honorable George Cosgrave, District Judge, as to said Charles W. Fourl only. Raphael Dechter, Esq. appeared as attorney for the petitioner E. A. Lynch, receiver, and for the court, and Edward W. Tuttle, Esq., appeared specially, as attorney for said Charles W. Fourl, and objected to the jurisdiction of the court to proceed summarily to try and determine the good faith claim of said Charles W. Fourl, as agent and attorney for John M. Eustace, of said John M. Eustace's ownership, possession and right of possession of said plumbing shop and business at 1246 East Ninth Street, Los Angeles, California. The court thereupon overruled said objection, to which ruling an exception was duly taken and allowed.

(Exception No. 1)

Charles W. Fourl, by his said attorney, thereupon filed with the court and made his motion to dismiss the said petition of E. A. Lynch and the order to show cause based thereon, upon the following grounds:

1. That said petition and order do not, either singly or together, state facts sufficient to show or to constitute contempt on the part of this respondent.

2. That said petition and order do not, either singly or together, state facts sufficient to show or to constitute a criminal contempt on the part of this respondent.

3. That said petition and order do not, either singly or together, state facts sufficient to show or to constitute a civil contempt on the part of this respondent.

4. That said petition and order, either singly or together, are not sufficient either in form or in substance to constitute a charge of criminal contempt against this respondent.

5. That said petition and order, either singly or together, are not sufficient in form to show or to advise this respondent whether it is intended to charge him with a civil or a criminal contempt.

6. The order purporting to appoint said E. A. Lynch Receiver does not purport to and does not in fact and in law authorize the said Lynch, as such alleged Receiver, to take possession of property not owned by the alleged bankrupt, Katie M. Eustace, and does not and did not authorize or purport to authorize said Lynch to take possession of the plumbing business conducted under the name of the Eustace Plumbing Company, and did not and does not authorize or purport to authorize any of the

acts of the said Lynch alleged or referred to in the said petition for said order to show cause.

In support of said motion counsel for said Fourl cited the following authorities:

Gompers v. Buck, Stove, etc. Co., 221 U. S. 418, 57 L. Ed. 797;

Michaelson v. U. S., 266 U. S. 42, 69 L. Ed. ....., 45 Sup. Ct. 18;

Oriel v. Russel, 278 U. S. 358, 73 L. Ed. 419;

Lamb v. Cramer, 285 U. S. 217, 76 L. Ed. 715, 52 Sup. Ct. 315;

In re: Francis, 136 Fed. 912;

In re: Falk v. Steiner, 165 Fed. 861;

Equity Rule U. S. 147.

The said motion was thereupon overruled by the court, to which ruling an exception was duly taken and allowed.

(Exception No. 2.)

Thereupon counsel for Charles W. Fourl served upon Mr. Dechter as attorney for the petitioner E. A. Lynch, and filed with the clerk, the verified answer of Charles W. Fourl to the said petition and order to show cause and requested the court to read the same.

THE COURT: I can't take time to do it, very well. You can state what you want to call my attention to.

MR. TUTTLE: I can't do that very well, if the court please, without reading the substance of the answer.

THE COURT: Now, gentlemen, this is the situation. Objection has been made that this proceeding cannot go forward because a question of title is involved. I don't

think that is a question here, not for a moment. I think the question here involves the integrity of the court's orders. My position was fully expressed to counsel the other day, I am sure, and in this proceeding the question solely depends on the ostensible ownership, that is, if it reasonably appears that this lady, defendant or alleged bankrupt, was in charge of the business, I expressed the opinion the other day that, from the evidence shown, that reasonably appeared to be the case. There was no question about that in my mind at all. Now, then, the Receiver here, according to the evidence the other day, was resisted. I think the proceeding is proper. Ultimately an upper court might find some fault with it, depending upon the distinction between a civil and a criminal contempt, but this is the only court functioning here today, of all four. Now, don't take up any unnecessary time. I do not intimate that you are doing it at all, but you will have to be prepared to speed the matter up considerably. Now, what is there, Mr. Tuttle, that you want to call my attention to that makes you think I should read the answer?

MR. TUTTLE: It is my idea, if the court please, that you can hardly try the issues involved here without knowing what the issues are, and I have set them up quite fully in the answer, and I would have to read the substance of that answer in order to properly present the matters to your Honor.

THE COURT: I am going to assume that you have denied the allegations of the citation or complaint, or

whatever it may be called. It is along the line that Mr. Fourl was merely protecting his own property, generally?

MR. TUTTLE: No.

THE COURT: Well, what else is there?

MR. TUTTLE: I have set up the facts with respect to the ownership and occupation of the property, the plumbing business known as the Eustace Plumbing Company, for the past 30 years, the fact that John M. Eustace is the husband of Katie M. Eustace, or that she is the wife, rather, of John M. Eustace; that John M. Eustace began the business some years before he married her in 1904.

THE COURT: Now, that means that somebody else owned the property. That is what I stated a moment ago. There is no necessity of going into that.

MR. TUTTLE: I make the contention in the answer that Katie M. Eustace was not, and never has been, in possession of the property, except as the wife of John M. Eustace.

MR. DECHTER: We are willing to meet that issue, your Honor.

THE COURT: Proceed. I can't take any further time, Mr. Tuttle.

MR. TUTTLE: Yes. May I note an exception to your Honor's refusal to read my answer?

THE COURT: Yes.

(Exception No. 3)

(Testimony of E. A. Lynch)

DIRECT EXAMINATION OF E. A. LYNCH

E. A. LYNCH,

the petitioner, called as a witness on his own behalf by his counsel Mr. Dechter, testified on

DIRECT EXAMINATION

as follows:

I am the receiver of the alleged bankrupt, Katie M. Eustace. On Monday morning September 10, 1934, I proceeded from my office to 1246 East Ninth Street, on the premises known by the name of the Eustace Plumbing Company, accompanied by W. D. Hunt and John Keenan. We entered the premises at 11:45 and found a Mr. Stevenson working on a grinding machine reconditioning second-hand machinery. Approaching Mr. Stevenson, we asked him who was in charge, and he said, "I am the only one here so I guess I am in charge."

MR. TUTTLE: I move to strike the statement of the witness as to the conversation which he had with Stevenson, whom he found there on the premises, on the ground that it is hearsay and incompetent for any purpose as to the respondent Fourl; that it couldn't establish any of the facts which Stevenson purported to state, and could not found any basis upon which the Receiver or the alleged Receiver would be authorized to proceed.

THE COURT: Overruled.

MR. TUTTLE: Note an exception.

THE WITNESS: I asked Mr. Stevenson—

MR. TUTTLE: Just a moment. Does your Honor treat that as an objection to the testimony and not too late for consideration?

(Testimony of E. A. Lynch)

THE COURT: It is all accorded that classification, and it will be deemed that the objection runs to all of the testimony.

MR. TUTTLE: Of that character?

THE COURT: Yes.

MR. TUTTLE: May we have an exception to all that class of testimony?

THE COURT: Yes.

(Exception No. 4)

The witness Lynch continued his direct testimony as follows:

I asked Stevenson where Mrs. Eustace was, and he said he didn't know, but that she usually arrived about 10 o'clock in the morning. I said, "Where is Mr. Eustace," and he said, "I don't know; I haven't seen him for more than a year." I said, "Well, who is the owner here?" Mr. Stevenson said, "Well, as far as I know, Mrs. Eustace is the owner." I then walked up to Mr. Stevenson and handed him a certified copy of the order appointing me receiver. He looked at it and said, "I don't know what this is all about, and I will lay it over here on the counter," which he did, about ten feet away from the place where I handed it to him, and he said, "I will leave it there until Mrs. Eustace comes."

Q Did anybody prevent your taking possession of those premises, Mr. Lynch?

A No.

MR. TUTTLE: I move to strike that answer, on the ground that it calls for a conclusion.

(Testimony of E. A. Lynch)

The court denied said motion and an exception was duly taken to said ruling.

(Exception No. 5)

The witness Lynch continued as follows:

Between 12:30 and 12:45 Mr. Stevenson was still on the premises and Mr. Hunt and Mr. Keenan were there. Mr. Hunt is a gentleman that is employed in my office, and Mr. Keenan is employed in my office from time to time in matters of this kind. As I stated, between 12:30 and 12:45, a car drove up to the front of the building, and Mr. Fourl and Mrs. Eustace alighted, and she came into the premises, and I was standing at the counter in the rear part of the store, and as she came in I said, "Mrs. Eustace?" and she said, "Yes," and I said, "I have a paper for you," and I handed to her a certified copy of the order appointing receiver. About, I should say, a minute or two after that Mr. Fourl followed her in, and he said, "What are you doing here?" I said, "Well, I am the Receiver and in possession." He stated, "Well, you have no possession here. This is the property of my Client, John Eustace." I said, "I have information that leads me to think otherwise, and I am going to remain in possession." And we had what I might say was a rather friendly argument. I stated to Mr. Fourl, "I am going to stay here," and he said, "Well, you are not; I am and you are not." So then the balance of the afternoon was spent in conversation on various matters, but from time to time Mrs. Eustace stated that I was not going to stay on the premises, and repeated that statement to two gentlemen that came in subsequently, Mr. Ben Stern, whom I had sent for to act as night watchman, and to Mr. George Dyer, whom I had sent for also. During the

(Testimony of E. A. Lynch)

course of the afternoon, or about 1 o'clock, I should say, I stated to Mrs. Eustace that, "I now make demand for all the books and records and keys to this premises," and Mr. Fourl spoke up and stated that there were no books or records. Mrs. Eustace very shortly thereafter went up the stairs onto the mezzanine floor and unlocked the offices of the business. I did not follow her up, but she came down again, and later in the afternoon, when I decided that I would make some attempt to go up the stairs, after due consideration, Mrs. Eustace came down, after answering a telephone call, and we were grouped about at the foot of the stairs, and Mr. Hunt and myself both offered Mrs. Eustace a chair to sit down in, and she said, "No, thank you; I will sit here," and she takes a newspaper and spreads it on the stairs and sits down on the stairs. Then in a conversation a little later I said to Mr. Fourl, "I wonder what Miss Wagner would say if she knew that I was down here as Receiver." Miss Wagner, may I explain here, is the secretary of Mr. Fourl. When this was mentioned Mrs. Eustace said, "Miss Wagner—she is the one who is at the bottom of this whole thing. She is the one that has caused all this trouble, and she is working with Mr. Dechter, trying to get this bankruptcy proceeding through." I dropped the conversation then, and Mrs. Eustace continued—or repeatedly reviled Mr. Dechter for his activities in this matter, and referred to other bankruptcy matters that he had participated in over a period of a year, and stated that he was the type of a man that she wouldn't hesitate to shoot down, and after she shot him that she would not consider that she had committed a murder. She said, "Further-

more, I have no fear of the law. I have no fear of any man or any woman or child, and I would *us* a gun to defend my rights, no matter what happened." The balance of the afternoon was spent in discussing various subjects pro and con, and when 5 o'clock arrived, or 10 minutes after 5, I stated to Mr. Fourl, "Well, is this going to turn out to be a New Years Eve watch party? We are all sitting around here." And he said, "Well, we are waiting to hear from Mr. Casey. He has been away on a picnic and won't get here until 5. And so 10 minutes after 6 I said, "Call up Mr. Casey," and Mrs. Eustace said, "Yes, call him up," and I said, "No, I want you to call him up." So Mrs. Eustace got on the phone and called Mr. Casey and stated that I was there and claimed possession of the premises. I, of course, couldn't hear Mr. Casey's conversation, but Mr. Fourl, in answer to it, said, "Yes, I consider that this is the business of Mr. Eustace, and Mr. Lynch is here as a trespasser and interloper," and I got on the phone and spoke to Mr. Casey, and I said, "Mr. Casey, I would like to call up Mr. Dechter on this matter before we get excited about it," He said, "No, you can't use that phone. Go outside and *us* a phone, and put Mr. Fourl on the phone." So Mr. Fourl took the phone again and had a conversation with Mr. Casey, and then he turned to me, and he said, "You can't use this phone, and you will have to vacate the premises." I said, "Well, Mr. Fourl, I am in possession, and you will have to put me out." So he finished his conversation with Mr. Casey, and I was back by the telephone and made a gesture to use it, and he stood in front of it, and I walked out through a little doorway into the

main display room of the premises, and he, as I say, finished his conversation with Mr. Casey, and he said, "Well, come on," and he put his arm around me, his right arm around my back, and his right hand on my wrist, and his left hand on my left forearm, and pushed me to the door, and, as I got to the door, he raised his knee to my back and gave me a little lift out of the door. Then I turned around, after the other gentlemen followed out that I had there, and Mrs. Eustace pulled a key out of her bag, or perhaps she had it on her finger; I refreshed my memory this morning, that all during the afternoon she had several keys on a ring and had them on her finger during the entire afternoon; and she turned around and locked the door and drove away.

She didn't get the key from Mr. Fourl. I told Mr. Fourl that I was in possession, and during the afternoon he told me that all the second-hand valves and gates and equipment used in a large refinery were used property and that he could show title to it, having bought the material from the Marine Engineering Company of Long Beach. I said, "Mr. Fourl, I am in possession, and you can take the proper procedure to recover this by bringing an order to show cause."

CROSS EXAMINATION OF E. A. LYNCH

On

CROSS-EXAMINATION

by Mr. Tuttle, attorney for Charles W. Fourl, the witness E. A. Lynch testified as follows:

My business is handling bankruptcy matters.

Q For how long?

(Testimony of E. A. Lynch)

THE COURT: Strike out such examination and get to the point here, Mr. Tuttle, or else I will examine the witness myself.

MR. TUTTLE: I note an exception to your Honor's refusal to permit that examination.

THE COURT: Yes. Go ahead.

(Exception No. 6)

MR. TUTTLE: I desire, if the court please—

THE COURT: The court knows that Mr. Lynch, the gentleman on the witness stand, has been a receiver in matters in the Federal Court time and time again. That was why he was appointed in this case, was because of the court's knowledge of Mr. Lynch, Mr. E. A. Lynch.

Q. BY MR. TUTTLE: How long have you known Mr. Fourl?

THE COURT: Mr. Tuttle, I want you to appreciate what I have been saying here. I want this matter confined to the essentials. His acquaintance with Mr. Fourl would make no difference whatever. What I want to know is this: Was there a putative authority or possession on the part of the alleged bankrupt, and was the possession of the Receiver interfered with? Nothing else is relevant or material.

MR. TUTTLE: If the court please, I don't desire to be disrespectful to the court. I want to proceed and defend my client here to the best of my ability, and I think in fairness I should be permitted to make such examination as would not alone concern itself with certain actual facts, but—

THE COURT: What relevancy would the time of his acquaintance with Mr. Fourl have to do with the question?

(Testimony of E. A. Lynch)

MR. TUTTLE: The witness is endeavoring to give the impression that Mr. Fourl used force and violence upon him. That is one of the allegations of the petition.

THE COURT. Yes. Well, Mr. Tuttle, would the extent of his acquaintance throw any light on that?

MR. TUTTLE: I think it would, if the court please, because I expect to prove, to offer evidence to show that, as a matter of fact, Mr. Lynch and Mr. Fourl were and had been for a long time very friendly and intimate acquaintances.

THE COURT: The question is disallowed. Take your exception. Proceed.

MR. TUTTLE: Note an exception, please.

(Exception No. 7)

THE COURT: Any further questions?

MR. TUTTLE: Yes, I have.

Q BY MR. TUTTLE: Before you went down there on the day in question, down to East Ninth Street, Mr. Lynch, did you have a conversation with Mr. Hiram E. Casey?

MR. DECHTER: To which we object, on the ground that it is not proper cross-examination.

THE COURT: Sustained.

MR. TUTTLE: If the court please, we desire to show the knowledge of this Receiver before he ever acted to take possession of that property that that property was not in the possession of Katie M. Eustace, as a matter of fact or law, and that the property belonged to her husband, John M. Eustace, and never had belonged to Katie M. Eustace.

THE COURT: Mr. Tuttle, the court expresses the opinion that if a Receiver or an officer of the court were

(Testimony of E. A. Lynch)

to be guided or affected by what counsel told him as to the facts in cases he would never get anywhere. I think that is evident to anybody. That fact would mean nothing at all. The objection is sustained. The ruling has already been made, however.

MR. TUTTLE: We note an exception.

(Exception No. 8.)

THE COURT: Yes. There is nothing before the court right now.

MR. TUTTLE: In order that the record may be clear, and that our exception will have some value, we offer to show by this witness that he did have a conversation with Hiram E. Casey, and that in that conversation Mr. Lynch told Mrs. Casey that he was going to crash Katie M. Eustace, and that in that conversation Mr. Casey told Mr. Lynch—

THE COURT: Now, don't make it too long. Mr. Casey gave the witness notice, or made the statement to him that Mrs. Eustace didn't own the property—that is the substance of it?

MR. TUTTLE: Not entirely. He advised Mr. Lynch not to meddle with the plumbing business if he should be appointed Receiver, because that did not belong to Mrs. Eustace, but belonged to her husband, John M. Eustace, and had always belonged to him.

THE COURT: That is enough. Proceed.

MR. TUTTLE: In connection with that offer, I want to add this further fact, that that conversation occurred before he went down to East Ninth Street to the plumbing shop, on the occasion in question, which he has described.

(Testimony of E. A. Lynch)

The witness Lynch further testified on Cross-examination as follows:

When I handed Mr. Stevenson the paper which I testified I gave him, I said "Mr. Stevenson, I am serving you with this order appointing Receiver." He looked it over and said, "Well, I don't know what it is all about, and I am going to leave it over here," He did not hand it back to me. During my conversation with Mrs. Eustace she did not make any threats to me personally. She did not have a gun in her possession, that I know of, nor did she say that there was any gun there. She never at anytime while I was there laid her hand on me. She said we were not going to stay there. She said that that business belonged to her husband. When Mr. Fourl first came in he told me that the business was John M. Eustace's business and that he, Fourl, was the agent and attorney for John M. Eustace. Mrs. Eustace handed a copy of the order of appointment to Mr. Fourl a few minutes after she glanced over it.

The mezzanine floor or balcony of the plumbing shop was open from the main display room in front. During the conversations I have described I was all through the main floor of the building. Access to the mezzanine floor is reached by a stairway that leads from the work room in the rear. During most of the conversation I was located at the foot of the stairway in the work room. Sometimes I walked to the front display room. Our conversation throughout the afternoon was in a friendly spirit, discussing the reconditioning of various parts of machinery and the methods used, and so forth. I said to Mr. Fourl "Well, where did you get all these valves, and

so forth," and he said, "I bought them from the Marine Engineering Company, and they got them," as I understood it, "from some place up in Owens Valley," and I said, "It looks to me like it might have come from the Clark Chemical Company," because it was covered with a white caustic soda, and he said, "Yes, I believe that is where it came from."

I told Mr. Fourl I was in possession and that as long as I was in possession nothing should be removed from the premises. I had an idea that Mrs. Eustace had an interest in that property there—some working interest, perhaps, with Mr. Fourl. I did not express any such idea to Mr. Fourl or Mrs. Eustace, nor did I inquire from them whether she had any such interest. Mr. Fourl told me he was building a refinery in Long Beach and that part of this material was to be used in that refinery. Mr. Stevenson was working on this material.

When Mr. Fourl took me by the arm and we walked to the front door, when we got ready to go out, I did not use any great resistance but I did resist to the extent that he had to urge me out of the door. I *d*aid "Mr. Fourl, if I am to go out of this place you will have to put me out." I have no recollection as to having suggested to Mr. Fourl that I would go out if he placed his hand on me. I said to him, "Mr. Fourl, if you put me out you will have to take hold of me and put me out." Yes, I perhaps smiled about it when I said it, and Mr. Fourl also smiled. When we went out together with Mr. Fourl's arm around me I certainly considered I was being thrown out, so far as physical violence is concerned. I felt that Mr. Fourl was very determined that I should

(Testimony of E. A. Lynch)

go out, and that if I had used any physical resistance, that there would have been a scene created there that would have involved a lady, and I felt that if such a scene took place or such an affair took place, that Mrs. Eustace, who is, in my estimation, a very temperamental woman, might thrust herself into the fray, and that would be conduct that I felt would be unbecoming an officer of this court. I did have two other men there with me at the time and we were there for the purpose of holding possession.

By my statement in my petition that Mrs. Eustace locked the door in my face I mean that she locked the door while I stood there. She used no violence toward me in doing that. I was walking away out to the sidewalk when the door was locked.

MR. TUTTLE: I do not wish to do anything contrary to your Honor's ruling. But there is another matter which I desire to offer to show by this witness, and that is the fact that he knew, in the course of his business, of the existence of a proceeding in this court, a bankruptcy proceeding, against John M. Eustace, filed by his creditors in the plumbing business at the East Ninth Street location, and that he was aware that no claim had ever been made that Katie M. Eustace owned that property, but that it was the property of John M. Eustace, that bankruptcy proceeding being—

MR. DECHTER: If the counsel wishes to make the witness his own witness for the purpose of going into those matters—

MR. TUTTLE: No; that isn't my purpose. My purpose is cross-examination to show the knowledge of this witness before he ever went down there, that there was

(Testimony of E. A. Lynch)

no basis whatever for the claim that Katie M. Eustace was in possession of that property in any sense of the term, and that she was not the owner of it.

THE COURT: What do you say to this statement, which I understand is admitted, that Katie M. Eustace had the keys to the premises?

MR. TUTTLE: My answer to that, if the court please, is that not alone did she have a key to the premises, but that Stevenson, the plumber, had a key to the premises, and numerous other people, and that, simply as a matter of convenience, she was there, as the agent and employee of her husband.

THE COURT: Now, the man inside said that he was employed by her, acting under her instructions. The evidence shows that she was running the business, that is, she was paying the bills of the business. The money was in the name of another party altogether, who apparently had no interest at all in it, and she was paying the bills, and carried in her possession half a dozen signed checks. Now, gentlemen, I think you had better recognize the obvious here. Under such circumstances it would be a reproach, it seems to me, to a court, to say that people could forcibly or in any manner prevent a Receiver of this court from taking possession of the property. The Receiver wasn't going to eat the property; he wasn't going to destroy it. There is an orderly process for adjusting all these matters. You are at liberty, of course, to show the amount of force used, and all that sort of thing, but I simply ask all the counsel in this case, out of respect to the position that the court is in, the calendar here, to hurry this matter here and

(Testimony of E. A. Lynch)

present it upon its merits, in other words, admit the facts. Here we are doing the same thing now that we did a few days ago, going over the same ground, which is made necessary—I will not say who is to blame for that. Proceed with the examination.

MR. TUTTLE: If the court please, I desire first to move to strike the statements of the court with respect to what the evidence shows here, other than such evidence as has been adduced on this hearing. Does the court grant the motion?

THE COURT: No, the court doesn't grant the motion. The court hasn't made any statement of evidence, other than what developed at the previous hearing.

MR. TUTTLE: That hearing we were not represented at.

THE COURT: No, I know you were not. Any further questions?

MR. TUTTLE: May I take an exception to your Honor's ruling?

THE COURT: Yes.

(Exception No. 9)

MR. TUTTLE: I want, in connection with the statement I was making there with respect to the prior bankruptcy proceeding against John M. Eustace, to include the number of that case in this court. It was case No. 9568-M, in the matter of John M. Eustace, Alleged Bankrupt.

THE COURT: That will be made part of your original offer.

MR. TUTTLE: It will not be necessary for me to ask the witness any questions with respect to that, in order to complete my offer?

(Testimony of E. A. Lynch)

THE COURT: No.

In that conversation I had with Mr. Casey over the telephone from the plumbing shop, he told me I had no business in the premises there and that I was a trespasser and that he advised Mrs. Eustace to eject me as a trespasser. He may have told me that if he were attorney for John M. Eustace he would advise that I be ejected, but I don't recall it that way. There was so much conversation going on all afternoon that it is hard to recall everything that was said. That conversation took place between 5:40 p. m. and 5:50 p. m. September 10th.

Q Did you know that Katie M. Eustace and John M. Eustace were husband and wife?

A I was told that.

Q Anl you had known that for a long time, had you not?

A Only what I was told.

Q I understand, but you had been informed long before your appointment that that was the fact?

A No, I had no information to that effect. I never knew of Katie M. Eustace until this matter happened.

Q Weren't you very familiar with the Eustace matters involved in this prior bankruptcy of John M. Eustace?

MR. DECHTER: I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

THE COURT: Sustained.

MR. TUTTLE: Note an exception.

THE COURT: Yes.

(Exception No. 10)

(Testimony of E. A. Lynch)

The witness E. A. Lynch, on cross-examination further testified as follows:

I knew nothing about the capacity in which Mr. Stevenson was acting there or was employed there, other than what he told me. He was the only person there. When I first entered the premises we walked in and looked around and inquired, as I stated before, for Mrs. Eustace and Mr. Eustace. I was inquiring for Mr. Eustace because I wanted to find out who was in possession, in control.

Q Didn't you already know that Mrs. Eustace was in possession and control?

A Yes.

Q Then why did you inquire for Mr. Eustace?

MR. DECHTER: To which we object, on the ground that it is argumentative.

THE COURT: Sustained.

MR. TUTTLE: An exception.

(Exception No. 11)

The witness on cross-examination continued as follows:

I didn't inquire of Mrs. Eustace for Mr. Eustace. I simply said this, "Mr. Stevensen, where is Mr. Eustace," and he said, "I don't know; I haven't seen him for more than a year."

Q How did you know there was a Mr. Eustace?

THE COURT: I don't think that that is important Mr. Tuttle.

MR. TUTTLE: If the court please, the witness has testified that he had—

THE COURT: Now, Mr. Tuttle, I have indicated my views, and I may be wrong, just as likely as not. But

(Testimony of E. A. Lynch)

apparently you do not contend really, in your zeal—I am not blaming you for it, but nevertheless I think it is unnecessary. As I say, the important point, in my view, is the ostensible ownership or authority of Mrs. Eustace there. I think that is the only thing.

MR. TUTTLE: If the court please, we think the examination I have made there is directed to that issue.

THE COURT: Well, I don't think so. It wouldn't make any difference what previous knowledge he had. If he went down there and found somebody, in the manner described a while ago, I would think that would be enough, under the circumstances.

MR. TUTTLE: Well, we note an exception to your Honor's position.

THE COURT: Very well.

(Exception No. 12)

The witness on cross-examination continued as follows:

Mrs. Eustace was not there when we first came up and entered the building. She came about half an hour after I showed the order to Stevenson.

MR. TUTTLE: I have no desire to impede speedy process here, but we feel that we are being rushed a little, if the court please. It is an important matter to us, and there are possibilities of penalty and fine involved here, and we think we should have a reasonable opportunity to present the evidence.

(Testimony of E. A. Lynch)

THE COURT: Now, Mr. Tuttle, you were here the other day, I believe, and you listened to the testimony.

MR. TUTTLE: If the court please, I am obliged to disagree with your Honor. I was not present at the hearing.

THE COURT: Well, all right. We will not go into it. But when you say that you are rushed, I think your clients could have been here at that time, and not impose upon this court the necessary of threshing this straw over twice. I respectfully suggest to you that I don't think there is any rushing that has been done here. That I say in all candor and fairness. Have you any further questions?

MR. TUTTLE: Of course, if the court please, at the hearing that was held here at which I was not present there was no reporter present at that time, and we have no record of it.

THE COURT: I don't care to go into that at all. Mr. Dechter, any further questions?

MR. DECHTER: No questions at all, Mr. Lynch.

MR. TUTTLE: May I note an exception to your Honor's last ruling?

(Exception No. 13)

THE COURT: I understand that you have no further questions to ask of Mr. Lynch?

MR. TUTTLE: Well, under your Honor's rulings, I don't understand how I can ask any more questions.

(Testimony of E. A. Lynch)

THE COURT: Go on.

MR. TUTTLE: There is one more question that I would like to ask Mr. Lynch.

THE COURT: Very well.

In response to further cross-examination by Mr. Tuttle the witness Lynch testified as follows:

On the day I went down to the plumbing shop on East Ninth Street I was not shown a copy of a certificate of fictitious name filed in the county clerk's office by John M. Eustace doing business as the Eustace Plumbing Company. I did see one up at the La Brea Street store a few days ago, and that one stated that John M. Eustace was doing business in two places in Los Angeles with no addresses. It is true that while I was there on East Ninth Street on September 10, this notice was read to me over the phone, of John M. Eustace doing business as the Eustace Plumbing Company in two places in Los Angeles, without any addresses. His residence address was given. The notice was read to me by one of my agents that I sent out to the La Brea Street Store. I had information that there were three stores; that there was one on Ceres Street. I had no knowledge except that there were three addresses; that is all. Mr. Dechter gave me the addresses after my appointment as receiver and before I went down to the East Ninth Street Shop. I had those addresses as to where the Eustace Plumbing Company was doing business and I went down to the East Ninth Street address. I knew they were at that address. I found out later from a man I sent over to the Ceres Avenue address that they had not been there for several months.

(Testimony of Katie M. Eustace)

DIRECT EXAMINATION OF KATIE M. EUSTACE

KATIE M. EUSTACE,

the alleged bankrupt, was called by Mr. Dechter as a witness on behalf of the petitioner E. A. Lynch, and was duly sworn as a witness.

MR. TUTTLE: At this juncture we respectfully inquire of the court whether the court regards this as a civil or a criminal proceeding, whether it is the purpose to punish for a civil contempt or a criminal contempt.

THE COURT: It is punitive, whatever inference you may draw from that. Go ahead with the witness.

To which ruling an exception was duly taken and allowed.

(Exception No. 14)

The witness Katie M. Eustace then testified on direct examination by Mr. Dechter, as follows:

I am a housewife and I assist Mr. Eustace in his plumbing business. I have helped sell and I answer telephone calls and assist in a general way. I get prices and help buy merchandise. I don't know how much money Mr. Eustace has drawn out of the business in the last year. I don't know how much money I have drawn out of the business in the last year. My son and I are not the only ones who have drawn money out of the business in the last two years. Mr. Eustace has drawn money; I don't know how much. Mr. Griffith has done the depositing of the money. I did not give Mr. Griffith the money. Whatever checks were delivered or mailed to the shop I would give to him to deposit. When I got cash sometimes I would hand it to Mr. Eustace, sometimes I

would hand it to the boy, and sometimes I would hand it to Mr. Griffith, and sometimes I would keep it; I would use it. Mr. Griffith has handed me blank checks signed by him and I have filled them in. At the last hearing on the citation against me for contempt I testified I had some Eustace Plumbing Company checks in my pocketbook and I did and you saw it. I produced three or four blank checks signed by Mr. Griffith that Mr. Griffith had given me that morning. I have sometimes used checks given me by Mr. Griffith, signed in blank, for paying my personal expenses. I have filled in such blank checks to pay for obligations incurred by me in drilling an oil well at Baldwin Hills with Mr. Kupfer. The money for these oil well expenditures was placed with Mr. Griffith by Mr. Kupfer's instructions. Mr. Kupfer instructed Mr. Griffith to keep the books and sometimes there would be something that would have to be bought, and we didn't know just what the price of it would be, and Mr. Griffith would give Mr. Kupfer and give me blank checks, signed with his name, and sometimes to Mr. Kupfer. Mr. Stone was one of the men who gave Mr. Kupfer the money to put in the bank account. I didn't know Mr. Stone's full name. Mr. Kupfer got the money from him. Mr. Stone lives out on Martel Street. The check for $2600. dated October 12, 1933 drawn on the Melrose-La Brea Branch of the Bank of America, signed by J. A. Griffith and the balance of the check is written *in* in my handwriting. The endorsement on the back is mine. It is made out to the Mission Refineries, Inc. I don't know how much money I paid to the Mission Refineries, Inc. in the last two years. It is just whatever checks Mr.

(Testimony of Katie M. Eustace)

Fourl gave Mr. Griffith to deposit and pay for this stuff and those checks were all made out to Mr. Griffith and signed by Mr. Fourl. I had no interest in the Mission Refineries, Inc. I couldn't tell approximately how much. It would be a guess on my part. We would go down there and look at an item and if Mr. Fourl wanted it, and if I knew what the price would be, he would give Mr. Griffith a check for it. Mr. Fourl would write out a check to Mr. Griffith and Mr. Griffith would deposit it and Mr. Griffith would give me a check in blank and I would write the check and turn it over to the Mission Refineries, Inc.

The check shown to me drawn on the Bank of Italy, Melrose-La Brea Branch, dated October 16, 1933, to Daniel Clark for $250. and with the endorsement on the back "Credit to the Account of Katie M. Eustace," and endorsed, "Katie M. Eustace" and "Daniel Clark" was a check given to Mr. Clark for $250 cash, which he handed to me. The only bank account that the Eustace Plumbing Company had was the bank account carried in the name of J. A. Griffith. That is the way Mr. Eustace wanted it. It is true that I would make personal purchases and pay for them by checks signed by Mr. Griffith on this same bank account in which the Eustace Plumbing Company carried its income. I don't know anything about the check stubs now shown to me or the notations on those stubs. I don't know what the notation with respect to a check issued on April 13, 1934, to Charles Farmer, "For K. W. E.—C. W. F." means. I don't know what the notation on the stub of March 27, 1934 "E.—4460" and "G.—3587", means. It looks like

Mr. Griffith's writing but I couldn't swear to it. Neither do I know what the notation immediately following, "E.—6960," means. I had not been paying from time to time to the Labor Commission of the State of California for unpaid labor on this well, at Baldwin Hills. I was never directed by the Labor Commission to make payments. I never used this bank account of J. A. Griffith to pay for attorneys fees to I. Henry Harris. There have never been any attorneys fees paid.

The three checks dated May 28, 1934 for $25, March 27, 1934 for $50, and April 20, 1934, for $2.75 signed James A. Griffith drawn on the Hancock Park office of the California Bank, all made out to Katie M. Eustace, all endorsed "Katie M. Eustace," two of them bearing the subsequent endorsement "Division of Labor, Statistics, and Law Enforcement," do not bear my endorsement. It is not my handwriting and it is not Mr. Griffith's handwriting. The check is made out in Mr. Griffith's handwriting. If Mr. Griffith had endorsed my name on the back he would have put his initials under it. I never went to the Division of Labor, Statistics, and Law Enforcement in the State Building in Los Angeles and delivered any checks to them. I was there once with Mr. Kupfer and Mr. Harris, my attorney. I never mailed any checks to the Labor Commission. Mr. Griffith told Mr. Harris that he was going to borrow some money and he was going to send in some money to this Labor Commission and I wanted them to go to trial on it; I wanted Mr. Harris to go to trial on it.

The check shown me, dated April 20, 1934, made out to Katie M. Eustace contains my endorsement on the

(Testimony of Katie M. Eustace)

back of it above the endorsement, "Broadway Department Store".

MR. DECHTER: I will offer these three checks, together, your Honor.

MR. TUTTLE: We object to them, on the ground that there is no sufficient foundation laid to connect them up with this witness in any wise.

THE COURT: Admitted in evidence.

To which ruling an exception was duly made and allowed.

(Exception No. 15)

(Whereupon an adjournment was taken until Saturday, September 22, 1934, at the hour of 9:30 o'clock A. M.)

On Saturday, September 22, 1934, at 9:30 A. M. the following proceedings were had:

THE COURT: Proceed.

MR. DECHTER: Mrs. Eustace, please.

THE CLERK: Your Honor, there are two orders to show cause in this matter and I am not clear whether Mrs. Eustace is testifying in the order to show cause directed to her or the order to show cause directed to Charles W. Fourl.

MR. DECHTER: As I understand, we are proceeding now only against Mr. Fourl and not on the matter against Mrs. Eustace. That was my understanding.

THE COURT: Wouldn't it be possible to consolidate the matters?

MR. DECHTER: The matter that we are now proceeding against Mr. Fourl on has already been heard by

your Honor and decided by your Honor, as against Mrs. Eustance. The order to show cause against Mrs. Eustance is for not turning over the proper keys to the Receiver.

THE COURT: Yes.

MR. DECHTER: It is a different matter entirely.

THE COURT: All right, proceed.

The direct examination of Katie M. Eustace was resumed and she testified as follows:

I have always had a key to the premises on East Ninth Street. The key which I produced on the hearing of the contempt charges against me is the only key I have ever had. I opened and closed the premises when I felt like it. I don't remember what Mr. Stevenson said when he testified at the previous hearing on the charge against me. I did not hire him the last time he was employed at the East Ninth Street Shop. He has worked there off and on for the last three or four years. The last time he came back to work he did talk to me about going back to work. He did not talk to me about salary. That was not discussed between us. He collected money and would turn in a slip at the end of the week. He asked if that was all right. He had asked Mr. Eustace before. He asked me if that was satisfactory and I said, "That is all right, John Doesn't care." I don't remember whether I ever filed an income tax return. I did not buy a bailer from the S. R. Bowen Company. I didn't buy anything from them. I have not been making payments to the L. A. Creditmen's Association on a bailer that was sold to the Eustace Plumbing Company. I went to the office of the L. A. Creditmen's Association at 111 West Seventh Street because some man in there wrote us a letter,

(Testimony of Katie M. Eustace)

wrote a letter to the Eustace Plumbing Company about some bailer that Mr. Allen had borrowed from the Bowen People for the well at Baldwin Hills, that Mr. Kupfer and I were drilling as partners. They mailed a bill to the Eustace Plumbing Company for it and we returned the bill. Mr. Griffith has made payments on that bill at the request of Mr. Harris, my attorney.

Q BY MR. DECHTER: I will show you a document from the bank check records of Mr. Griffith, what appears to be a reconciliation statement, and which I have just shown counsel, which has the following notations:

"321.78 K. M. E., paid out March;
"178.34 K. M. E., paid out April 1st;
"168.49 K. M. E., paid out May;"

and has similar entries for June and July; and then it has entries:

"K. M. E. Paid in March 76.31;
"K. M. E. Paid in April 37.00;
"K. M. E. Paid in May 170.00;"

Do you recognize that handwriting?

A It looks like Mr. Griffith's.

"K. M. E." are my initials but I don't know who he means it for. Those amounts are not amounts of money put in Mr. Griffith's account by me. There was nothing of that amount paid out for me.

MR. DECHTER: I would like to offer these in evidence, your Honor.

MR. TUTTLE: We object to them on the ground there is no sufficient foundation laid. It is an assumption that they are taken from Mr. Griffith's records.

(Testimony of Katie M. Eustace)

THE COURT: Overruled.

To which ruling an exception was duly taken and allowed.

(Exception No. 16)

The witness further testified on direct examination as follows:

I have never had Mr. Griffith prepare an income tax return for me. Up until about six years ago I had no income to report. The last time I saw any copy of an income tax return prepared for me was the one prepared by Mr. Reed, the auditor. I don't know his first name. I couldn't tell you what office building he is in but I can get his address for you. It may have been four years ago; I am only guessing.

CROSS-EXAMINATION OF KATIE M. EUSTACE

On cross-examination, by Mr. Tuttle, attorney for respondent Charles W. Fourl, the witness, Katie M. Eustace, testified as follows:

Mr. Kupfer, one of the petitioning creditors in this bankrupt proceeding against me, and I were engaged in drilling an oil well at Baldwin Hills as partners. Money was paid out of the account of J. A. Griffith for expense in connection with that oil well. The money that was put in Mr. Griffiths account for the oil well came from different people that bought percentages in the well. Mr. Kupfer wanted Mr. Griffith to keep the money. From time to time requests were made upon Mr. Griffith by me or by Mr. Kupfer for checks or money which he held in his account from the deposits from these various persons who bought percentages, to pay expenses of the

(Testimony of Katie M. Eustace)

operations on the oil well. I can't tell offhand how much money was deposited with Mr. Griffith and applied on the oil well but it was probably approximately seven or eight thousand dollars. The net profits made in the conduct of the Eustace Plumbing Company during the last year or two years I don't believe will average $100 a month. There was no business of any consequence during the last year or two at East Ninth Street. The business there had dwindled off to almost nothing. Most of the business that was being done by the Eustace Plumbing Company was being done at the shop at 166½ La Brea Avenue, Los Angeles. My Husband, John M. Eustace, was active in the business. He was out there at the La Brea Shop, directed the boy, helped him. By the boy, I mean our son, John Eustace, who has been active in the business with his father for the past nine years. The part of the business of the Eustace Plumbing Company which I endeavored to take care of was getting prices for them, ordering after that if the prices were all right for me to order for them, and answering telephones. I never opened the place of business at East Ninth Street and I very seldom closed it. I had no plumber's license or certificate of qualifications under the ordinance of the City of Los Angeles and have never had one. My husband, John M. Eustace and our son John Eustace did each have such a certificate of qualifications as a master plumber. A certificate of qualifications as master plumber is required under the ordinance of Los Angeles to be held by one operating a plumbing business. I have never put any money into the plumbing business either at East Ninth Street or at La Brea Avenue or at any locations where my husband was engaged in the plumbing

business. We have been married thirty years this November and he was in the plumbing business when I married him, contracting and repairing.

Q Where was he located?

THE COURT: That I do not regard as material, Mr. Tuttle.

MR. TUTTLE: We want to show by this witness, if the court please—

THE COURT: Do not argue. Do not argue. We are down to the present day, you know, and I have stated before, and this is my view, that we are governed by the principles as of the day this Receiver was appointed. That is my view in this case, so that it is useless going back.

MR. TUTTLE: I will endeavor to conform to your Honor's ruling. I simply want the record to show what we are prepared to prove.

THE COURT: No, I will decline to allow time to be taken up. I think you have sufficiently shown that. I know you have, in fact, for the basis of any exception, so do not do that.

MR. TUTTLE: May we have an exception to your Honor's ruling?

THE COURT: Yes, sir.

(Exception No. 17)

The witness further testifies on cross-examination as follows:

I had a key to the premises on East Ninth Street and others had keys including my husband, our son and various employees. Mr. Kupfer had a key. Mr. Steven-

son who has been mentioned in the testimony was employed by my husband, John M. Eustace, originally in 1925 and at various times since then he has worked at the East Ninth Street shop off and on as we needed him.

At the hearing of the contempt charge against me I was required to produce certain blank checks drawn by J. A. Griffith. I received those checks from Mr. Griffith that morning. They were to be used to pay for some pumps and buy some merchandise for Mr. Fourl. Mr. Fourl was making purchases of a large amount of equipment of various kinds for use in the construction of a refinery at Long Beach. He was making those purchases through Mr. Griffith, with my help. Money was handed from time to time by Mr. Fourl to Mr. Griffith for the purpose of depositing in Mr. Griffith's account to make payments on those purchases. I had no interest in that money which was deposited in Mr. Griffith's account by Mr. Fourl.

On September 10th, 1934, the day that Mr. Lynch went down to the shop at 1246 East Ninth Street, when he came into the shop I was not handed a copy, or a certified copy by Mr. Lynch of his appointment as Receiver and he did not show me such a copy at any time while we were there. I did not have a gun of any kind there. I never owned a gun in my life and had no gun in the shop. I did not state to Mr. Lynch that I would use a gun on anybody trying to gain possession of the property at East Ninth Street. Mr. Lynch proceeded to tell me the unlimited powers of a Receiver and said that he had one bankruptcy case of a Mr. Baer and they went in there and there was a safe there, and this safe be-

longed to another corporation and he insisted that this safe be opened and Mr. Baer would not open it, so they just got dynamite and blew the safe door open. And in that connection I said to him, "Well, if this man that owned the safe and was there, and Baer had nothing to do with it, he would be standing on his rights to have used a gun." And he says, "Why with a Receiver." I did not make a statement to the effect that I would use a gun against Mr. Dechter.

I was present when Mr. Fourl and Mr. Lynch left the shop on that day. Mr. Lynch said, "There is only one way I will get out of here, Charlie. You will just have to touch me on the arm." It was very friendly. "And I will get out." Mr. Fourl says, "Well, this is John M. Eustace's property and this is his place of business and you will have to." So he jokingly just happened to touch Mr. Lynch and they went out very friendly. Mr. Lynch made no apparent resistance whatever. He walked through the door. He got about four feet outside and I followed and just locked the door. They were laughing and talking and in a joking manner I said to him, "This looks like a spring dance."

REDIRECT EXAMINATION OF KATIE M. EUSTACE

On redirect examination by Mr. Dechter, Katie M. Eustace testified as follows:

Mr. Kupfer and I sold royalty per cents in the oil well in order to help finance the drilling and the money was

put into the bank account of Mr. Griffith. We gave assignments of certain interests in the well in consideration of this money and the money was deposited in Mr. Griffith's bank account, I imagine in the same way that the money of the Eustace Plumbing Company was *se*posited in that account. I have had no bank account of my own and I have had no income of any kind except what came out of the Eustace Plumbing Company. Rents collected by me from various pieces of real property owned by me have gone to pay the taxes on the real property. These rents were handed to Mr. Griffith and put in his bank account and he did pay out the expenses for taxes, water, and street work.

It is a fact that my husband was away in Mexico for about twelve months but he has been back from Mexico for two years. During the time he was away our son, John, ran the Eustace Plumbing Company. I took orders from him. I testified in a divorce hearing between my son and his wife that he was working for 75 cents an hour and forty per cent of the profits. That is what I testified to, because that is what the fact is. When my husband was away that time I helped my son, John. If he wanted anything bought he would say to me, "Get the price on that." Then when I would get the price on it he would say to me, "Order it." It is not true that since my husband returned from Mexico he has been away for periods as long as three or four months at a

time. The fact is he has been trying to put over some mining deals and would be gone maybe a week, come back, sometimes two weeks and come back. The longest time he has been away is three months.

RECROSS EXAMINATION OF KATIE M. EUSTACE

On recross examination by Mr. Tuttle, Katie M. Eustace testified as follows:

The Mission Oil Refinery referred to in my testimony was the refinery from which the equipment was being purchased for use in the Long Beach Refinery which Mr. Fourl was building. The income from the Eustace Plumbing Company was used in the family expenses of myself and my husband in our home where we were living together. Sometimes Mr. Eustace would come in with a mining deal. He would set up some machinery or something and he would hand me $25 or $50 to use to run the house, or tell me to give it to Mr. Griffith and deposit it. My husband received money from time to time out of the Griffith account whenever he asked for it. My husband did not consent to my using any of the proceeds from the Eustace Plumbing Company going into the Griffith account, for this oil well that Mr. Kupfer and I were drilling. He didn't want me to have anything to do with it.

(Testimony of George T. Dyer)

DIRECT TESTIMONY OF GEORGE T. DYER

GEORGE T. DYER

called as a witness on behalf of the petitioner, E. A. Lynch, being first duly sworn testified as follows:

I am employed by Mr. Lynch from time to time in connection with receiverships and trusteeships in which he is acting.

(The witness was shown a large bundle of checks.)

The Receiver received those checks from the files at 166½ North La Brea which is one of the places of business of the Eustace Plumbing Company. As far as I remember, these checks run from about November, 1932 up to and including July 31 or 30th of 1934 I made an examination of those checks. The manner in which I went through those checks, I do not believe I saw one check issued to John M. Eustace that I could interpret as being John Eustace, Sr. There are some checks issued to John Eustace which are endorsed by John Eustace, Jr. My testimony is that I was unable to find any checks made out that were endorsed by John Eustace, Sr.

Q BY MR. DECHTER: In going through the books that you got from Mr. Griffith, did you find any record of any wages having been paid to John Eustace, Sr.?

MR. TUTTLE: Just a moment. We object as hearsay and not binding upon this respondent in any way.

The COURT: These are the receivership books, aren't they?

MR. TUTTLE: These are not receivership books, if the court please. These are the personal books of Mr. Griffith and therefore not material to the receivership.

(Testimony of George T. Dyer)

THE COURT: Mr. Tuttle, Mr. Griffith was the treasurer of the bank account.

MR. TUTTLE: That is true in this case, but he was not Mr. Fourl's agent in that respect and, therefore, any statements which appear in his books with respect to those matters would not in any wise be binding upon Mr. Fourl in this proceeding.

THE COURT: Overruled. Answer the question.

MR. TUTTLE: Exception.

(Exception No. 17)

The testimony of the witness continued as follows:

In going through the books, that we got from Mr. Griffith, we did not find any record of any wages having been paid to John Eustace, Sr.—no entries in there that would show that John Eustace, Sr. received any hourly wage; and the only answer that I could give was the answer that John Eustace, Jr. gave to me right in the place of business at 166½ North La Brea.

Q BY MR. DECHTER: And what was that conversation that you had with John Eustace, Jr.?

MR. TUTTLE: Just a moment. We object to that as wholly hearsay.

THE COURT: It is, but nevertheless he apparently was either an employee or apparently a principal in this business.

MR. TUTTLE: That is true, your Honor, but the admissions or statements of an agent are not competent evidence except when they are made within the scope of his employment during the performance of his duties as such agent. And it is apparent—

THE COURT: No, that would be true in a case on trial, but this is an informal hearing, understand. The

(Testimony of E. A. Lynch)

court makes up its mind here from all the facts and circumstances produced. Objection overruled. Answer the question.

MR. TUTTLE: Exception. (Exception No. 18)

A I asked Mr. Griffith if they kept an account for Mr. John Eustace, Sr., and the answer was given by John Eustace, Jr. in words to this effect: "Why, no. No one questions what he makes in this business and no books are kept for him."

DIRECT EXAMINATION OF E. A. LYNCH, RECALLED

E. A. LYNCH

recalled as a witness on his own behalf testified on direct examination as follows:

I made an examination of the checks and bookkeeping records that Mr. Griffith turned over to me. In that examination I did not find any evidence of any payments being made to John Eustace, Sr. I got from Mr. Griffith a book which purported to be the cash receipts and disbursements of his business or the Eustace Plumbing Company and in going through that book I found an entry where John Eustace was paid $4.00 on September 1 of this year, and also a book that I would describe, on one side of the sheet would be what they called a work sheet and the other page would be marked expenses—expenses of the month, and the work sheet showing the distribution on this work sheet of various plumbing jobs. These are the books I spoke of as having been turned over by Mr. Griffith.

CROSS-EXAMINATION OF E. A. LYNCH

The witness E. A. Lynch testified on cross-examination by Mr. Tuttle as follows:

Q BY MR. TUTTLE: Mr. Lynch, did you find in these books that you have described evidence that Mr. Griffith was apportioning the overhead of the business and the cost of materials, for the purpose of determining profit whereby he might distribute to John Eustace, Jr. a 40 per cent of the profits?

A There was no names at the top of the pages indicating the distribution of the profits and purchases, etc., but he pointed out that this column is for John Eustace, Jr., 40 per cent of this column is for Mr. Eustace.

I do not recall just what the heading was, but I know his name was not on there. In the first column it would show the amount of sales and then it would show a column for the cost of the merchandise, of the cost of the labor, and apparently 40 per cent was receipted for by John Eustace, Jr. and then the balance to go to John Eustace, Sr. of the net profits. That was his explanation of it, but there were no names at the top of the pages or columns.

REDIRECT EXAMINATION OF E. A. LYNCH

On redirect examination the witness E. A. Lynch testified that the three books which he had mentioned were in the La Brea Street store under the care of the keeper and that he would have them produced at once.

(Testimony of B. A. Stern)

DIRECT EXAMINATION OF BENJAMIN A. STERN

B. A. STERN,

called as a witness on behalf of the petitioner E. A. Lynch being first duly sworn testified as follows:

I am employed from time to time as a keeper of places of business in charge of Mr. Lynch as Receiver and trustee and I was so employed for that purpose on September 10th, 1934 at the place of business of the Eustace Plumbing Company on East Ninth Street. I was there on that day. When it was told to Mrs. Eustace that I was to stay there all night she did make threatening statements and she said it would be too bad for me if I did, and I told her that I was working for Mr. Lynch and if he told me to stay there that night, I would stay there.

(At this point the petitioner rested.)

RESPONDENT CHARLES W. FOURL'S CASE

MR. TUTTLE: If the court please, I want to conform, as I have stated, to all the court's rulings. And I desire to expedite this matter and save the court's time. I had prepared this morning a formal offer which I could read in two or three minutes, setting forth the matters we desire to prove. Certain of those matters have been touched upon, but I do not think sufficient to show our position and I desire to read this offer as I

have prepared it this morning, for the purposes of the record.

On behalf of the respondent Charles W. Fourl we offer to show the following facts, and we offer to make that proof through witnesses who are available here. Does your Honor excuse us for not going further and putting the witnesses on the stand and asking formal questions to make this showing?

THE COURT: You are going to make your offer of proof. You are allowed to do that, sir. Do I understand you?

MR. TUTTLE: I want to know if the court desires me to call witnesses?

THE COURT: Oh, no. Your offer of proof, while it is not always the best method, it will be allowed. So go right ahead. It will be deemed that you call the witnesses, of course.

MR. TUTTLE: We offer to show that Katie M. Eustace, alleged bankrupt, is and since the year 1904 has been the wife of John M. Eustace. That they are and ever since 1904 have been living together as husband and wife and residing in Los Angeles, California. That John M. Eustace was for several years before his marriage engaged in the plumbing business; that after his marriage he continued in the same plumbing business, which was a retail and contracting business. That about a year after his marriage his wife, Katie M. Eustace, began to assist him in this business a little. As she learned the business, devoted her time to the office and shop side of the business and that her husband devoted his time more to the estimating, contracting and mechanical side of the business. That never at any time has the wife, Katie M. Eustace, invested or in anyway put any money into this plumbing business. That the business was

originally conducted from a shop on Main Street, Los Angeles. That it was later moved to and conducted at 830 Ceres Avenue in the same city. That in the year 1923 John M. Eustace moved this business to 1246 East Ninth Street in the same city, and retained the Ceres Avenue place for a while as a warehouse. That about 1929 the Ceres Avenue place was discontinued. That when business at the East Ninth Street location had dwindled to a point of little profit, John M. Eustace, in the year 1930, opened another shop at 166½ La Brea Avenue in the western part of Los Angeles, where it was possible to get more retail plumbing jobs, and put his son, John Eustace, Jr., in this shop. That this son had been learning and assisting him in the business since 1925. That John M. Eustace and his said son each had and have the certificate of qualification as master plumber required by the ordinances of the City of Los Angeles of persons engaged in the business of plumbing, and issued to them by the Board of Building and Safety Commissioners of that City. That Katie M. Eustaces does not have and never has had such a certificate. That a license is required by Los Angeles City Ordinance for all plumbing business and that the license for the plumbing business to Eustace Plumbing Company conducted at 1246 East Ninth Street and 166½ La Brea Avenue is and was long prior to the proceedings in this bankruptcy proceeding issued to John M. Eustace.

We offer to show further that Katie M. Eustace has never filed the application or taken any proceedings required by Sections 1811 to 1821, California Code of Civil Procedure, with respect to married women desiring to become sole traders. That their living expenses have always been paid out of the proceeds of the plumbing

business conducted in the locations named by this offer of proof.

MR. DECHTER: To which offer of proof we will make the objection that it is incompetent, irrelevant and immaterial; that the only issues on this particular hearing is who was in possession or control of the premises on East Ninth Street on the day that the Receiver went down there and what, if any, force or steps were taken to evict the Receiver from said premises after he had secured peaceful possession of them. Those are the only two issues before the court at the present time, and I make my objection upon the ground that the offer is entirely incompetent, irrelevant and immaterial, except as confined to those two issues.

THE COURT: That is the view, of course, that the court expressed and that is the ruling. Therefore, the objection is sustained.

MR. TUTTLE: That there may be no misunderstanding, I do not understand that this objection goes to the fact that I have already suggested to the court that we have not made the offer in the proper form?

THE COURT: No, no. That is not my understanding, and it will be deemed that you have offered witnesses who will testify to those facts. I do not know but your statement said that you would prove them. I would not agree to that exactly. In other words, but you would offer testimony in support of what you have suggested, what you have read, but this ruling is made—let me make it perfectly clear—as though you had offered witnesses who testified that those were the facts. In other words, no objection on the ground that you have not called witnesses to support your statement. Is that satisfactory?

MR. TUTTLE: I think that covers the matter. We take an exception to the court's ruling.

(Exception 19.)

MR. TUTTLE: We desire to offer in evidence so that the record may show the form of the certificate of qualifications which we have referred to in our previous offer, the certificate of qualifications to the master plumber issued by the Board of Building and Safety Commissioners of the City of Los Angeles on February 23, 1934.

MR. DECHTER: We have no objection to those documents being offered, Mr. Tuttle.

THE COURT: Very well, let them be admitted.

THE CLERK: Mr. Fourl's Exhibit A.

The said Exhibit A is as follows:

CITY OF LOS ANGELES

No. 3086-B

RENEWAL
CERTIFICATE OF QUALIFICATION
MASTER PLUMBER
(Printed impression
of seal of City of
Los Angeles)

Date

Feb. 23, 1934

This certifies that Mr. J. M. Eustace, Sr., 1246 E. 9th Street, Los Angeles, California has satisfactorily passed the examination presented by ordinance No. 58500 as Master Plumber, and is entitled to engage in, and work at the business of plumbing within the limits of the City of Los Angeles, subject to the rules, regulations, and provisions of said ordinance, for the term of one year from this date, unless license shall be sooner re-

voked or suspended. If not renewed within time prescribed by Ordinance, another examination must be taken and examination fee paid.

Witness our hands this February 23, 1934. This certificate expires February 23, 1935.

Board of
Building and Safety Commissioners
City of Los Angeles

(Seal of Board of B & S C L. A., Cal.)

Robert H. Orr
President

F. A. Munsie
Secretary

MR. TUTTLE: And with that we offer certified copy, certified by the County Clerk of Los Angeles County, the certificate of business under fictitious name filed by John M. Eustace in the County Clerk's office, which speaks—

MR. DECHTER: Filed in February of this year.

MR. TUTTLE: Yes. It speaks for itself.

MR. DECHTER: No objection.

THE CLERK: That will be Exhibit B.

The said Exhibit B is as follows:

The undersigned, John M. Eustace, hereby certifies that he is conducting a plumbing business at two locations in Los Angeles, California, under the fictitious name of Eustace Plumbing Company; that the sole owner of the said business is John M. Eustace, and that he resides at No. 901 North Kenmore Street, City *of* the County of Los Angeles, in the State of California.

Witness my hand this 16th day of February, 1934.

John M. Eustace.

STATE OF CALIFORNIA)
County of Los Angeles) SS

On this 16th day of February, 1934, before me, J. A. Griffith, 166½ North La Brea Avenue, a Notary Public, in and for said County, personally appeared John M. Eustace, known to me to be the person whose name is subscribed to the within instrument and he acknowledged to me that he executed the same.

Witness my hand and official seal.

Notarial
(SEAL)

J. A. GRIFFITH,
Notary Public in and for said County and State.

Filed Apr. 2, 1934,
L E. Lampton, County Clerk
By I. L. Murstein, Deputy

45551

With the foregoing certificate of fictitious name is an affidavit of publication subscribed and sworn to by C. F. Brown on April 27, 1934, before Ruth B. Altizer, Notary Public for Los Angeles County California, and to which affidavit is annexed a copy of the foregoing certificate. In said affidavit the affiant deposes and says:

That he is and at all times herein mentioned was a citizen of the United States, over the age of twenty-one years, and that he is not a party to nor interested in the above entitled matter; that he is the principal clerk of the publisher and proprietor of the Greater Los Angeles, a newspaper of general circulation, printed and published weekly in said county and which newspaper is published for the dissemination of local news and intelligence of a general character, and which newspaper at all times herein mentioned had and still has a bona fide

subscription list of paying subscribers, and which newspaper has been established, printed and published in the said County of Los Angeles for a period exceeding one year; that the notice, of which the annexed is a printed copy, has been published in the regular and entire issue of said newspaper, and not in any supplement thereof, on the following dates, to-wit:

April 5, 12, 19, 26, 1934.

Upon said affidavit is endorsed "Filed May 11, 1934, L. E. Lampton, County Clerk, By I. L. Murstein, Deputy.

Annexed to the foregoing certificate of fictitious name and affidavit of publication is the following certificate under the seal of the Superior Court of Los Angeles County.

STATE OF CALIFORNIA) No. 45551 (Fict.)
) SS.
County of Los Angeles)

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court within and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and correct copy of the original certificate of fictitious name and affidavit of publication in the matter of the Eustace Plumbing Company; as the same appear of record, and that I have carefully compared the same with the original.

In witness whereof I have hereunto set my hand and affixed the seal of the Superior Court this 20th day of September, 1934.

(SEAL)

L. E. Lampton, County Clerk,
By G. M. Hysong, Deputy

(Testimony of C. W. Fourl)

DIRECT EXAMINATION OF CHARLES W. FOURL

C. W. FOURL,

the respondent called as a witness in his own behalf and being first duly sworn testified as follows:

I live in the City of Los Angeles and have lived here for a good many years. I am an attorney, licensed to practice law in the State of California and have been for the past 25 years. I have been attorney for John M. Eustace for the past 7 or 8 years. After the filing of the petition in bankruptcy against his wife and in view of the manner in which the proceeding was entitled as Katie M. Eustace doing business as the Eustace Plumbing Company, he consulted me with respect to his rights in the Eustace Plumbing Company and he authorized me to appear and protect his rights and to do whatever was necessary in connection with any proceedings which might be taken in the receivership. On September 10, when I was present at 1246 East Ninth Street at the Plumbing shop of the Eustace Plumbing Company, Mr. Lynch did not serve upon me or hand me or have anyone else hand me a copy or certified copy of the order of appointment of Mr. Lynch as Receiver. At no time during that afternoon did Mr. Lynch ask me to leave the premises nor did he during the course of that afternoon ask Mrs. Eustace to leave the premises. I was there present continuously from 1 o'clock until approximately 6 o'clock. Mr. Lynch was away a little while. He went out a little while and left a couple of his men there. After we stepped out upon the sidewalk,

(Testimony of C. W. Fourl)

Mr. Lynch made no offer to or request to reenter the building. We made no effort to prevent his reentering the building. As a matter of fact Mr. Eustace went out to get in my car that was sitting in front of the building and the door was left open, left ajar about two or three feet; and Mr. Lynch and two of his men were out on the front of the driveway and Mrs. Eustace was getting in my car, leaving the door open, and I said to her, "Well, you haven't locked the place." She walked back, locked the place, fiddled around for her keys and finally locked the place. Mr. Lynch made no request upon Mrs. Eustace for the keys to the shop. During the course of the afternoon while we were all there together at the plumbing shop I did not see or hear any threatening gestures or language addressed by Mrs. Eustace to anyone there present. Nothing occured in my presence that was of a threatening gesture, and I do not think, from what I saw, that there was anything of that kind occurred. The only thing that I heard in the way of angry tones or language in anger was when Mrs. Eustace gave Mr. Dechter a few raps. Outside of that our conversation was very friendly all afternoon. We stood there together talking it over, talking about everything else but this; and, as a matter of fact, we were waiting for Mr. Casey to come back. We wanted to talk to Mr. Casey and we found out that Casey was not home. Then I said to Lynch, "I want to talk to Casey about the matter." And Lynch says, well he says, "I don't think you are going to find him there. I think he has gone to a Native Sons' affair of some kind." Well, I said I would call him a little later and we found out he would not

be home until 5:30 or 6 o'clock, so we sat around there until 5:30, or '45, something of that kind and Lynch says, "Well, is this going to be a wake?" I said, "No." I said, "We will try to get hold of Casey again." And then the question arose whether he should call him or I should call him or Mrs. Eustace should call him. And finally, I think Mrs. Eustace called Casey's home, and right after she called there she turned back to us and said, "Well, he is just driving in. Now we will have to wait a moment." So we then talked with him on the 'phone and explained that Mr. Lynch was there and trying to take possession of the matter, of the place of business, and then he said that he wanted to talk to Mr. Lynch. And he talked to Mr. Lynch and finally he said he wanted to talk to you, and then I talked to him a moment and then he hung up the phone.

When we got ready to go, I stated to Mr. Lynch, I said, "Now, Mr. Lynch," I said, "This is the business of John M. Eustace. You will find that the certificate of fictitious name is in his name. He has been in business for about 35 years." I said, "You are, it seems to me, in this situation: That, I think, ought to be taken into account." He then got hold of the man that was out at the La Brea store and who, from the conversation, read to him a certificate of fictitious name which they had found out there.

When we were closing up, I said to Mr. Lynch, "Now, you can't remain here, Mr. Lynch." I said, "This is the place of business of Mr. Eustace and the court never authorized you or anybody else to take possession of property other than the property of the bankrupt or alleged bankrupt in this case, Katie M. Eustace." And I

said, "There is a real liability on your bond under this situation and I don't believe that I would endeavor to take possession of this." He said, "Well, Charlie," he said, "I went out of a place similar to this at one time." He said, "I was reprimanded." And he said, "You will have to place your hand on me and then I will go out with you." So I said, after I got done joking with Casey on the phone, why, I said, "Come on, we are going to close up." And Lynch was standing and I put my arms around his waist and we walked out to the door. Not a particle of resistance of any kind, no argument or discussion of any kind. And when I got out on the outside, about four or five feet, why, I took my knee and playfully pushed him, and that was outside in the doorway. I imagine the doorway in front of the house, the place where we park cars is probably 12 or 15 feet between the sidewalk and the store and that is where that occurred. Lynch stood there and talked to two of his men. I am not sure whether two or three. This man was here and two other of his men, and then spoke about going to the telephone somewhere in the neighborhood and Mrs. Eustace and I got in the car and we drove away. The door was left open. She had been in my car and came back and fumbled around in her purse and got the keys out and locked the door. Neither Mrs. Eustace nor I made any statement to the receiver to the effect that he could not put a padlock or a lock on the door.

(Testimony of C. W. Fourl)

CROSS EXAMINATION OF CHARLES W. FOURL

Mr. Lynch never called Mr. Dechter on the telephone while I was there on that afternoon. At the end of the day he said he was going out to telephone to Mr. Dechter. He did not make any statement to me during that afternoon that he had been advised that if he found the bankrupt in possession he was entitled to take possession. There was no discussion of any matter of that kind. I knew, as a lawyer, that if the bankrupt was in possession and claiming title to the property that the Receiver was entitled to succeed to that possession. I knew that at that time Mrs. Eustace had a key to the premises. I did not know that she had keys that opened the door on the mezzanine floor. When Mrs. Eustace and I came in to the shop she went upstairs and there is a little balcony up there and has a door with a glass in it, leaving two-foot glass in there, and she went up and opened that door and went to the telephone there, and that was open all the balance of the afternoon. As a matter of fact, she asked Mr. Lynch if he wanted to go up and telephone upstairs at one time, and Mr. Lynch says, "No." She said, "You can't telephone down here unless that is fixed." He said, "No, I have just taken that off and I can telephone right here." I saw Mrs. Eustace open the door to the mezzanine floor and I saw her take the key out of her pocket and close the outside door of the shop after Mr. Lynch and I had walked out. I did tell Mr. Lynch dur-

ing that afternoon that he was a trespasser. I told him that this was the property of John M. Eustace, who was in possession and control of it and that he, Lynch, was a trespasser. Mr. Lynch did not at any time during that afternoon suggest that I file a petition for reclamation. Such a matter was not discussed at all. When I arrived at the plumbing shop with Mrs. Eustace I was driving a V-16 Cadillac. Mrs. Eustace drives one of my cars, a La Salle car which she uses whenever she is about my business. I did not say she uses it every day in the week. She sometimes keeps it at her home at 901 North Kenmore at night. If we need the car we take the car and utilize it. She is buying for me most of the time. I would say that the car is kept at night at 901 North Kenmore most of the time. It is my car. She has not been using it ever since the car was purchased. I had seen Mr. Eustace within a week prior to September 10th. I was authorized to appear if there was any attempt to take possession of the business of John M. Eustace.

Q I mean, where did you get that authorization, because a week prior to that time there had not been any bankruptcy proceedings filed?

MR. TUTTLE: Just a moment. We object to that.

THE COURT: Do not interrupt. Do not interrupt. When this thing gets hot it is time for counsel to keep quiet.

MR. TUTTLE: I take an exception to counsel's statement as an untrue statement, shown by the record to be untrue, and I take exception to your Honor's remarks.

(Exception No. 21)

(Testimony of C. W. Fourl)

THE COURT: That is substantially what the record shows. Answer the question.

A I have a general authorization, in the first place, from Mr. Eustace to represent him in any matter that may arise, and have had for a number of years; and in the next place, we knew that you had been calling up, called up me, for example, and you had called up Mrs. Eustace and had threatened to do a lot of things for weeks before, and were trying to hold me up in connection with the transaction. I remember Mr. Dechter stopping me on the street about a month before the bankruptcy petition was filed and telling me that I. Henry Harris, the attorney for Mrs. Eustace, had offered to settle this judgment by giving a note signed by Mrs. Eustace and monthly payments of $2500 guaranteed by me, payable at $100 a month and that Mr. Dechter wanted to know if that was correct. I told Mr. Dechter that was not correct. I told him at that time that I had a trust deed on all her real estate and laughingly said that it was a bona fide trust deed. I cannot recall how long it has been since I personally appeared in any court proceeding for John M. Eustace. Mr. Tuttle has looked after most of my business and he may have appeared in court for John M. Eustace since 1928. I very seldom appear in court but my office does through Mr. Tuttle. I see Mrs. Eustace quite often and have been seeing her quite often on business and other matters for the past three years. She has been helping me in making purchases for business enterprises in which I am interested and I have confidence in her ability to purchase well. It is not true that for the last three years I seldom had occasion to see Mr. John M. Eustace. I see him

in fact quite frequently out at his home at 901 North Kenmore. As I said I discussed business matters with John M. Eustace about a week before September 10, 1934, but I refuse to state what the discussion was about because I stand on my rights as an attorney not to divulge any private communication between my client and myself. It is not true that John M. Eustace is very illiterate. He is not very good as far as reading and writing is concerned but he is quite intelligent from a business angle. He operated the business down at that plumbing shop there, and at one time they were building four or five school buildings at Long Beach, building a Government hospital, all the plumbing work and heating. Out at San Fernando. That was about 1926 and 1927. He had done that for years. In the last three years Mr. Eustace has been keeping supervision of the plumbing business, but he has been interested in mining. The construction business which he must depend upon as a plumber has been rather poor so that he has placed a great deal of his attention to the businesses which were better and offered more chance of profit. I know that last year for a period of about four months he was down at the oil well at Baldwin Hills looking after the interests of his wife down there and that he got a few dollars a day as a side compensation as watchman and I have heard that he filed suit against certain sub-contractors for wages as a watchman. The facts are these: That his wife and this man Kupfer were interested in an oil well down at Baldwin Hills. There was some kind of a suit arose between them and he went down there and remained there, and he made some sort of a side deal, as I understand it, with Meadows to look after certain

things there. And Meadows became involved in that well and he secured some extra compensation from that in looking after their interests, too. I heard that he filed suit against certain sub-contractors employed by Mrs. Eustace and Mr. Kupfer for his wages as watchman. He got an allowance of Meadows' proportion of what he was to secure, but primarily he was there to protect the interests of his wife. He was not working for mere wage. He slept on the premises for the reason that it was necessary to prevent some people from running away with the derrick and the rotary and everything else. I think that was a very wise thing to do. He had a capable wife and son who could look after his interests. I do not pay Mrs. Eustace any compensation for doing this buying for me. She has been buying for me for probably 16 or 18 months. She has no interest whatever and gets no compensation of any character. It is just a matter of convenience. Mr. Lynch never made any demand on Mrs. Eustace for the keys to the premises at any time during the afternoon of September 10,—not in my presence.

RE-DIRECT EXAMINATION OF CHARLES W. FOURL

On redirect examination by Mr. Tuttle, Charles W. Fourl testified as follows:

I could not say exactly. John M. Eustace is, I imagine, about 52 or 53, around there. He has one arm that is in bad shape, interferes with manual labor of any extensive sort, heavy work. As I have stated, I know there were times in the contracting plumbing business done by John M. Eustace when he had three or

four big schools, big jobs running into large sums of money, forty to fifty thousand dollar jobs at a time. He had at times as high as some 70 employees and he had plumbing jobs on the San Fernando Veterans Hospital and I think the heating too, but I am not sure of that. At that time an explosion occurred from a gas leak under one of the buildings when a watchman lit a match and blew up a portion of the building and he was held responsible for the explosion.

RECROSS EXAMINATION OF CHARLES W. FOURL

On recross examination by Mr. Dechter, Charles W. Fourl testified as follows:

I was the attorney for Mr. Eustace at the time he made the settlement with his creditors. I remained at the plumbing shop on September 10 from 1 o'clock to 6 o'clock because we were waiting to talk with Mr. Casey in connection with the matter and we thought we could persuade Mr. Lynch that he should go out and go to court and present it to the court and get its order or direction as to what should be done in the matter.

Upon the conclusion of the testimony of Charles W. Fourl it was stipulated in open court between counsel for the petitioner E. A. Lynch and Counsel for the respondent Charles W. Fourl that Mrs. Eustace would testify that Mr. Eustace is 58 years of age. It was further stipulated that portions of the record and files

(Testimony of C. W. Fourl)

in the matter of Katie M. Eustace, Alleged bankrupt, might be deemed to have been offered and read the evidence on behalf of the respondent Charles W. Fourl without the necessity of reading them in evidence and that this stipulation would cover the original petition of the petitioning creditors against Mrs. Katie M. Eustace, the petition upon which E. A. Lynch was appointed Receiver, and the order appointing Mr. Lynch as Receiver. It was further stipulated that the order appointing Mr. Lynch as Receiver was made ex parte without notice to anyone, that at such ex parte hearing no evidence was taken and that the order appointing the Receiver was made upon the verified petition therefore together with the allegations of the original involuntary petition in bankruptcy.

(Whereupon an adjournment of the hearing was taken to 1:30 o'clock P. M. of the same day, Saturday, September 22, 1934.

At 1:30 P. M. Saturday, October 22, 1934, the Following proceedings were had:

Mr. Dechter, attorney for petitioner E. A. Lynch, introduced in a promissory note in form as follows:

$96.00 April 27, 1933

Five days after date without grace I promise to pay to the order of Wilson Spear Co., Ninety-six dollars, for value received, with interest from date at the rate of..... per cent per annum until paid. Principal and interest

payable in lawful money of the United States at 4601 E. 52nd. Drive, and in case suit is instituted to collect this note or any portion thereof I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

Katie M. Eustace

No. Due May 2. 1246 E. 9th Street.

It was stipulated that the signature and address beneath it on this note are in the handwriting of Katie M. Eustace.

Mr. Dechter also introduced in evidence a check dated September 28, 1933, drawn on the Bank of America by J. A. Griffith, payable to Spears and Wilson Company, in the sum of $4.75, with the typewritten words across the back, "Account of Katie M. Eustace in full to date," and endorsed "Pay to the order of Bank of America National Banking Association – Wilson – Spear Co., W. R. Atwood, Receiver."

It was stipulated that the above note and check had nothing to do with the Eustace Plumbing Company business but related to the oil well venture in which Mrs. Eustace and Mr. Kupfer were partners.

Mr. Dechter then introduced in evidence a check drawn by J. A. Griffith to the Eustace Plumbing Company for $600, dated September 29, 1933, and endorsed across the back, in the handwriting (and so stipulated) of Mrs. Eustace, "Eustace Plumbing Company" and below this "Katie M. Eustace."

Objection to the introduction of this last check was made by Mr. Tuttle as "irrelevant and incompetent and not within the issues." The objection was overruled and exception duly taken and allowed.

(Exception No. 22)

(Testimony of E. A. Lynch)

DIRECT EXAMINATION OF E. A. LYNCH, RECALLED

E. A. Lynch was recalled as a witness on his own behalf and testified as follows: I have made a hurried examination of the books and redords that I got from Mr. Griffith to determine what moneys if any were paid to John Eustace, Sr. according to the notations in the books. These books were turned over to me by Mr. Griffith.

Q BY MR. DECHTER: What did Mr. Griffith say they were?

A Mr. Griffith said—might I explain in detail just what conversation and when it took place?

MR. DECHTER: Yes.

MR. TUTTLE: We object to the conversation with Mr. Griffith. It is hearsay as to us.

MR. DECHTER: You asked for foundation.

THE COURT: Overruled.

MR. TUTTLE: Exception to the hearsay statements of Mr. Griffith.

(Exception No. 23)

A We left the place, 166½ North La Brea. It was arranged to meet Mr. Griffith there. In fact, I sent Mr. Ben Stern with him out of the building to go with him in his car but when Mr. Griffith got down to Los Angeles and Market Streets he told Mr. Stern to go along and take a bus out there and he would meet him out there. We proceeded here and found the doors locked and remained all night. The next morning at 8:20 Mr. John Eustace, Jr. came into the place. I walked in behind him

and stated that I wanted to make a demand for the books and records. He said, "Mr. Griffith has them locked up in the desk there." He says, "He will be here very soon." A few minutes after that Mr. Griffith came into the rear door and handed me these books, three books. And I said, "Where did you have these, Mr. Griffith?" He says, "I got them from the place where they were taken yesterday." I said, "Where was that?" He said, "Well, a young lady here and she took them out and they were handed to me this morning by John Eustace." He was somewhat confused as to just where he got the books from.

The witness further testified on direct examination as follows:

My statement in summary of what the books shows is the result of my own personal examination. According to the entries in this book here which purports to be a report of each business month and what is known as a work sheet on the opposite page—in this book the first entry shown, the first page of the work sheet of August 1932—from August, 1932 up to and including June, 1934, appears an entry of cash paid—I can't get that—under the heading on the page is the total of general expenses starting at that point and going back. On June 13, it shows John M. Eustace, cash $4.25. I have not totalled the amount here, I was in such a hurry today, but I should say the total amount received by John M. Eustace between the two dates stated would not exceed $50, paid in amounts as low as 25 cents and up to $4.25. The number of items is 41. Some of the items are marked "J. M. for gas" and here is "lunch 30 cents, parts 56 cents, gas $1, gas, lunch, parts, and cash.

(Testimony of E. A. Lynch)

CROSS EXAMINATION OF E. A. LYNCH

On cross examination by Mr. Tuttle the witness E. A. Lynch testified as follows:

The book from which I have made this tabulation and the page which I have open here and which contains the item that I first called attention to "John M. Eustace, $4.25", is under the heading of "General Expenses". These particular items to which I have referred are just simply marked "expenses". I do not know what it was for. They are not marked in any way to show that they are a payment of the net proceeds to John M. Eustace. I did not find in this book an account with John M. Eustace. There does not purport to be any account with John M. Eustace. There is nothing in the book that purports to show what John M. Eustace may have taken out of the business so far as net proceeds are concerned. All that I have found in the book here are these small items of $1, $2, or less then a dollar or two or three dollars which are for items like those I have described. For gas, parts, cash and such things. Small items of cash. I made a very hurried examination at noon time of this book and wrote down just what I found in the books there. Sometimes it says cash, sometimes car parts, and other times there is no notation at all as to what it is for. But there is nothing in any of the notations that I found here indicating that it is a disbursement in any way to John M. Eustace for any profits of the business or any returns of the business. It is a fact that throughout the book on one page on the left-hand side is an entry of the various items which are tabulated at the top or named at the top "February Expenses" or "March Expenses",

or whatever the month may be. And on the opposite side at the head of the sheet it is marked "March Work Sheet", in which the various jobs are listed with notations in the columns, showing when billed, the phone number, profit, labor cost, profit labor total; apparently being an effort to apportion receipts from each of those jobs so as to show what the various items of expense are, in addition to the items stated over on the opposite side, an apportioning of profits. The work sheet evidently is made up in order to apportion the costs of profit, labor costs, and the second column is for profit and labor and the total. There is nothing to indicate where that was posted to at all and nothing to indicate in this book what disbursement was made of the profits.

At the conclusion of the testimony of E. A. Lynch it was stipulated in open court between Mr. Dechter, counsel for the petitioner and Mr. Tuttle, Counsel for the respondent, Charles W. Fourl, that there has been no order of adjudication of bankruptcy in the matter of Katie M. Eustace, Alleged bankrupt.

It was further stipulated that upon September 12, 1934 the day of the hearing of the contempt charge against Katie M. Eustace, E. A. Lynch the Receiver went back to the East Ninth Street place of business and put a padlock on it and that that padlock is still on it.

It was further stipulated as a fact that none of the petitioning creditors, in the matter of Katie M. Eustace doing business as the Eustace Plumbing Company, Alleged bankrupt, were creditors of the Eustace Plumbing Company and that their claims had nothing to do with the Eustace Plumbing Company. But it was objected by Mr. Dechter that the fact stipulated to is immaterial

(Testimony of E. A. Lynch)

which objection the court sustained, to which ruling an exception was duly taken and allowed on the understanding between both counsel and the court that the stipulation as to the fact would be sufficient as an offer of proof of the fact on the part of the respondent, Charles W. Fourl. I knew and was advised during the morning of September 12 that an order to show cause directed to *Kate* M. Eustace and Charles W. Fourl had been issued by the court and was scheduled for hearing on September 12th at 2:00 P. M.

(Exception No. 24)

Whereupon the parties rested and Mr. Tuttle moved to dismiss the proceeding as to the respondent C. W. Fourl. on the ground that the evidence was insufficient to sustain a conviction for contempt; there was no proceeding pending in which the court could adjudge the respondent guilty of a criminal contempt; and upon the grounds stated in the original motion to dismiss; which motion was overruled and to which ruling an exception was taken.

(Exception No. 25)

The court then found the respondent Charles W. Fourl guilty of contempt and the matter was continued for sentence until Monday, September 24, at 11 o'clock A. M.

On Monday, September 24, 1934, at 11 A. M., the following proceedings were had:

MR. TUTTLE: May it please the court, so that the record may be clear, the court knows that there has been two separate proceedings here. I do not want the record

to become confused in the actual judgment or sentence which the court may give, because it may complicate the record; and I desire to have whatever your Honor does this morning so far as my client, Mr. Fourl, is concerned done in such a way that it will not be confused into one act of the court covering both of them.

MR. DECHTER: As I understand it, after the stipulation made with Mr. Casey, there is one order to show cause directed to both Mrs. Eustace and Mr. Fourl why they should not be ordered to restore the possession of the premises on East Ninth Street to the Receiver and why they should not be adjudged in contempt for evicting the Receiver. Then there is a subsequent contempt citation against Mrs. Eustace for not having delivered the proper means of gaining access to those premises after being so directed to do by the court in open court. That is my understanding of it.

THE COURT: Yes, that seems to be the situation.

MR. TUTTLE: Your Honor will recall, however, that there was a hearing with respect to Katie M. Eustace upon the order to show cause directed to both Katie M. Eustace and Charles W. Fourl, and at which we were not present and represented. And, therefore, the record is to a considerable extent separate and must be kept separate, and we do not want to be in the position of having the proceedings united in such a way that it may embarrass us in any subsequent proceedings that may be taken.

THE COURT: Well, they were joined in the same order to show cause. The hearing was had with respect to each at different times.

MR. TUTTLE: And on different evidence.

THE COURT: And on, it might be said, different evidence, all of which is separate in the record and, as I recall, there was some order made just the other day respecting that, was there not, Mr. Tuttle?

MR. TUTTLE: Stipulation was entered into between Mr. Dechter and Mr. Casey, representing Katie M. Eustace, at which time I requested your Honor to make the record clear that we were not involved in the stipulation.

THE COURT: I do not think you need apprehend any danger. They are not jointly—in a sense, of course, they are jointly charged. The sentence, however, will not in any sense be joint and each one might appeal. Each has a further remedy to the same extent as though he had been charged alone entirely. That is my understanding of your situation.

MR. TUTTLE: Very well, if that is the situation. And before the court proceeds with any sentence or judgment, I desire to renew my objection on behalf of Charles W. Fourl to the jurisdiction of the court to proceed summarily to hear and determine and punish as a contempt respondent's good faith claim as the agent and attorney of John M. Eustace, the ownership, possession and right of possession of the plumbing business conducted at 1246 East Ninth Street in John M. Eustace.

THE COURT: That is a motion?

MR. TUTTLE: Yes, I renew that objection.

THE COURT: Denied.

MR. TUTTLE: Exception, please, and I desire a motion to move to dismiss and discharge the whole proceed-

ing as to Charles W. Fourl, on the grounds already urged in these proceedings.

(Exception No. 26)

THE COURT: Motion denied.

MR. TUTTLE: Exception.

(Exception No. 27.)

"THE COURT": No, I do not care for any law in this matter at all. The matter stands submitted, I understand, now.

This whole case from the very inception has been about as disagreeable a task as has ever confronted this court, and I trust that it will be a long day before I again listen to a recital of conduct such as has been recited here.

This evidence convinces me that ostensible possession and actual possession was in this lady, Mrs. Eustace. She had the keys to the place. She assumed to order the Receiver out. I expressed myself fairly on that, I guess, the other time.

Accompanied by the other respondent here, Mr. Fourl, she *forbad* the Receiver to have anything to do with the place; said she would not allow him. The Receiver was ejected from the premises. The slightest force is used, the Receiver adopting the well known policy that any force is sufficient, and being of the nature, desired to avoid disagreeable scenes, he consented to being ejected from the premises when a man of another disposition might well, and properly, have caused a different story here, a different result.

I want it understood now that this court does not tolerate any such action as has been taken in this case; and

I was considerably surprised when Mr. Fourl attempts to justify his action as of a friendly nature and agreed to. That is what surprised me in this hearing. I supposed that this hearing was based upon the right, the asserted right of these people to do what they did do, refuse to honor an order of this court. He was ejected from the premises.

The evidence developed here with regard to the connection with this business of this lady is nothing—in view of that evidence, I will say, her claim that the Receiver was not justified in assuming that she is the person involved is nothing short of ridiculous, and I very much regret that any lawyers—and I will say this advisedly—practicing before this bar have ever countenanced, advised, tolerated or encouraged such proceedings as have been shown here. The respect that is due to this court and to its orders will cause anyone to oppose—anyone who has a proper regard for himself as a lawyer or for the mandates of the court or the respect that is due to the court—it is difficult to speak with calmness of what has taken place in this proceeding as recited here.

After hearing a few days ago, Mrs. Eustace, ordered by the court to turn over the keys to the premises, purported to do so, practiced a deliberate deception, a deliberate disobedience of the court's order right here in the presence of the court. It was not done. The court rejects as totally untrue the statement, both of this gentleman, Mr. Fourl, and of Mrs. Eustace, that they knew

nothing of any change in the locks. Too ridiculous, gentlemen, to be commented upon. A contempt in the very presence of the court of a very serious nature. That is what we have before us here, coupled with the further facts, this bookeeper, possessing the bank account of this business a fugitive at this moment, the United States Marshal, the officer of this court, unable to locate him after the most diligent search and what is, as reported to me by the marshal, the greatest deception. In line with everything else here, it seems to have impregnated everybody in connection with this case.

I say again, and I say seriously that it passes, with one possible exception—and that is within the last week—anything that I have seen here for an unsavory piece of business. This bookeeper issuing checks signed by him which Mrs. Eustace carries around; she, in effect, in control of the bank account and not him; refusing to honor the order of the United States Marshal.

Such proceedings are not to be countenanced. Those are not the kind of acts that are recited in this court.

Stand up, Mr. Fourl and Mrs. Eustace. You are adjudged in contempt of this court for a most flagrant violation of the order of the court; and you, Mrs. Eustace, violating the spirit in which the court acted a few days ago. You are both adjudged in contempt of this court. Sentence will not be pronounced upon you now, but it will on Monday at 11:00 o'clock in the morning.

Mr. Fourl, do you agree to be present at that time?

MR. FOURL: Yes, sir.

THE COURT: Otherwise, you will be placed in the custody of the United States Marshal to insure your presence here.

MR. FOURL: I will be here at that time.

THE COURT: I say to you, sir, that any one who knows that he is under citation before this court, who refuses and fails to come to court, loses my respect instantly, any lawyer at this bar much more so. Be seated. Be seated, madam."

Whereupon the court pronounced its judgment in sentence of contempt as follows:

"Mr. Fourl, you are sentenced to pay a fine of $1,000; to stand committed to the custody of the United States Marshal until it is paid."

Whereupon the respondent Charles W. Fourl was immediately taken into custody by the Marshal pursuant to the sentence and order of the court.

Whereupon the respondent Charles W. Fourl prays that the foregoing statement of the evidence and proceedings be settled, allowed, signed and authenticated and made part of the record for use on the appeal taken by him to the United States Circuit Court of Appeals for the Ninth Circuit.

Edward W. Tuttle
Hiram E. Casey
Attorneys for Charles W. Fourl.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of Katie M. Eustace, etc., Alleged Bankrupt. - - - - - - - - - - - - - - - - E. A. Lynch, Receiver of Katie M. Eustace, etc., Petitioner, –vs– Charles W. Fourl and Katie M. Eustace, Respondents.	No. 23770-C STIPULATION SETTLING STATEMENT OF EVIDENCE ON APPEAL OF CHARLES W. FOURL AND KATIE M. EUSTACE

It is hereby stipulated and agreed that the foregoing statement of evidence on the appeals of Charles W. Fourl and Katie M. Eustace in the above entitled matter contains all the evidence which is relevant and material to and which is necessary for a full determination of the issues on the appeals of the said Charles W. Fourl and Katie M. Eustace from the judgments and sentences against them for contempt in the said matter; that the evidence is set out in simple and condensed form; that the testimony of the witnesses is stated in narrative form except where statement in the form of questions and answers is necessary to accurately reflect what occurred;

It is further stipulated that that portion of the statement of the evidence included in the foregoing statement that was had in the Katie M. Eustace matter only and was not also had in the Charles W. Fourl matter should apply to, and be, a part of the Katie M. Eustace appeal only; and,

It is further stipulated that that portion of the statement of the evidence that was taken in the Charles W. Fourl matter, may be, and is, a part of the statement of the evidence on appeal herein in the Katie M. Eustace matter.

The foregoing stipulations just hereinbefore made, are hereby made to conform with the stipulation of counsel and the order of Court that was made during the hearings on the said proceedings before the Hon. George Cosgrave, presiding.

It is further stipulated that we have received due and legal notice of the statement as required by equity rule, and we hereby waive further notice of the filing of said statement and we agree that the said statement as made may be approved by a Judge of the United States District Court, Southern District of California, without further notice to the parties hereto, and when so approved may be filed in the Clerk's office and become a part of the record for the purposes of the appeals taken by Charles W. Fourl and Katie M. Eustace, and shall be taken and deemed by the Court as a statement of evidence on both appeals in the above entitled proceedings.

R. Dechter
Attorney for E. A. Lynch & Court

Edward W. Tuttle
Hiram E. Casey
Attys for Charles W. Fourl

Hiram E. Casey
Attorney for Katie M. Eustace

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of Katie M. Eustace, etc., Alleged Bankrupt.	No.23770-C
E. A. Lynch, Receiver of Katie M. Eustace, etc., Petitioner, –vs– Charles W. Fourl and Katie M. Eustance, Respondents.	ORDER APPROVING AND SETTLING STATEMENT OF EVIDENCE ON APPEAL OF CHARLES W. FOURL AND KATIE M. EUSTACE

It appearing that the foregoing statement is a full, true and correct statement in simple, condensed form of all of the evidence which is relevant, material and necessary to a full determination of the issues on the appeals of Charles W. Fourl and Katie M. Eustance in the above entitled matter from the judgments and sentences of contempt

against each of them and that the testimony of witnesses is stated in narrative form except where the form of questions and answers is necessary to correctly reflect what occurred;

It is hereby ordered that the foregoing statement be and the same is hereby settled, allowed and approved as such statement on the said appeals and the same may be filed as, and become a part of, the record on said appeals of Charles W. Fourl and Katie M. Eustace.

DATED: Los Angeles, California, May 16, 1935.

Geo. Cosgrave

District Judge

Approved as to Form, under District Court Rule #44.

R. Dechter

Att'y for Petitioner, E. A. Lynch

[Endorsed]: Lodged R. S. Zimmerman Clerk at 46 min. past 4 o'clock Oct. 8 1934 P. M. By Theodore Hocke Deputy Clerk. Filed May 16, 1935 11 o'clock A. M. R. S. Zimmerman, Clerk Theodore Hocke Deputy.

At a stated term, to wit: The September Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif., on Saturday, the 22nd day of September, in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable: GEO. COSGRAVE, District Judge.

In the Matter of	)	
	)	
Katie M. Eustace, etc.,	)	No. 23770-C-Bkcy.
	)	
Alleged Bankrupt.	)	

This matter coming on for hearing on (1) order to show cause, filed Sept. 18, 1934, on petition of E. A. Lynch, directed to Katie M. Eustace, alleged bankrupt, to show cause why she should not be adjudged in contempt and why the receiver should not be instructed concerning the premises at 1246 E. 9th Street, Los Angeles; and (2) order to show cause, filed Sept. 18, 1934 on petition of E. A. Lynch, directed to J. A. Griffith to show cause why he should not be punished for contempt of court, etc.; and (3) order to show cause, filed Sept. 18, 1934, on petition of E. A. Lynch, directed to Charles W. Fourl to show cause why he should not be punished for contempt of court, etc.; Raphael Dechter, Esq., appearing for the Receiver; Hiram E. Casey, Esq., appearing for Katie M. Eustace, the alleged bankrupt; E. W. Tuttle, Esq., appearing for Charles W. Fourl; Albert Bargion being present as court reporter;

In reference to the order to show cause on alleged contempt of Charles W. Fourl:

Katie M. Eustace, heretofore sworn, resumes the stand and testifies on direct examination by R. Dechter, Esq., re contempt of Charles W. Fourl, testifies on cross-examination by Edw. W. Tuttle, Esq., and in connection with her testimony the following exhibit is offered and admitted in evidence, to-wit:

Receiver's Ex. 1: 10 blank checks and adding machine tape;

Geo. T. Dyer is called, sworn and testifies for the Receiver on direct examination by R. Dechter, Esq.;

E. A. Lynch (not sworn) testifies on direct examination by R. Dechter, Esq., and is examined by the Court;

Benjamin A. Stearn is called, sworn and testifies for the Receiver on direct examination by R. Dechter, Esq; and in connection therewith the following exhibits are offered and admitted in evidence, to-wit:

Fourl's Ex. A: Certificate of qualification of Master Plumber of J. M. Eustace, Sr.;

" " B: Certified copy of certificate of fictitious name and affidavit of publication in the matter of Eustace Plumbing Co.;

Chas. W. Fourl is called, sworn, and testifies for himself on direct examination by E. W. Tuttle, Esq., is cross-examined by R. Dechter, Esq., testifies on redirect examination by E. W. Tuttle, Esq., is examined by the Court, and thereafter,

At 11:08 o'clock a. m. recess is declared to 1:30 o'clock p. m.; and court reconvening in this matter at 2:48 o'clock

p. m., appearances being as before, A. H. Bargion being present as court reporter, it is ordered that counsel proceed with the hearing on order to show cause directed to Charles W. Fourl, whereupon, the following exhibits are offered and admitted in evidence. to-wit:

Receiver's Ex. 2: Promissory note, 4/27/33, to order of Wilson Spear Co., signed by Katie M. Eustace, for $96.00; and check dated 9/28/33, to Spears & Wilson Co., signed by J. A. Griffith;

Receiver's Ex. 3: Check to Eustace Plumbing Co., dated 9/29/33, signed by J. A. Griffith, for $600.00;

E. A. Lynch resumes the stand and testifies further on direct examination by R. Dechter, Esq., and on cross-examination by Attorney Tuttle, and in connection with his testimony the following exhibits are marked for identification as indicated, to-wit:

Receiver's Ex. 4
-- for Ident. -- Twin Lock loose leaf book;

Receiver's Ex. 5
-- for Ident. -- Day Book, Katie M. Eustace, d. b. a. Eustace Plumbing Company;

(These two exhibits may be withdrawn)

At 3:10 p. m. the evidence closes on order to show cause directed to Charles W. Fourl, and E. W. Tuttle, Esq., moves to dismiss order to show cause as to Fourl, and argues in support thereof, there being no ruling on said motion at this time.

At the hour of 3:10 p. m., on the order to show cause directed to Katie M. Eustace,

Katie M. Eustace is called, sworn and testifies for the Receiver on direct examination by R. Dechter, Esq., is cross-examined by H. E. Casey, Esq., testifies on redirect examination by R. Dechter, Esq., on re-cross-examination by H. E. Casey, Esq., and is examined by the Court; and on said order to show cause, directed to Katie M. Eustace,

Charles W. Fourl, heretofore sworn, is recalled and testifies on behalf of the Receiver on direct examination by R. Dechter, Esq.;

E. A. Lynch is called, sworn and testifies on direct examination by R. Dechter, Esq., and is cross-examined by Attorney Casey;

Charles H. Meade is called, sworn and testifies for the Receiver on direct examination by R. Dechter, Esq., and is cross-examined by H. E. Casey, Esq.;

John Eustace is called, sworn and testifies for the Receiver on direct examination by R. Dechter, Esq., and is cross-examined by Attorney Casey;

George T. Dyer is called, sworn and testifies for the Receiver on direct examination by R. Dechter, Esq., and is cross-examined by Attorney Casey;

Katie M. Eustace, heretofore sworn, resumes the stand and testifies on further examination by H. E. Casey, Esq., is cross-examined by R. Dechter, Esq., and testifies on re-direct examination by H. E. Casey, Esq., whereupon,

The receiver rests; and H. E. Casey, Esq., moves to dismiss order to show cause directed to Mrs. Eustace re contempt, which motion to dismiss is denied; whereupon,

On stipulation of Raphael Dechter and Hiram E. Casey, Esqs., it is ordered that the original order of September 13th, 1934, made as to Katie M. Eustace, finding her guilty of contempt, is vacated and set aside; it is further stipulated with respect to said Katie M. Eustace that the evidence subsequently adduced in support of the citation against Charles W. Fourl be deemed to supplement the evidence heretofore adduced as to Mrs. Eustace; and that the objection made by E. W. Tuttle, Esq., for Mr. Fourl may be deemed, in so far as it applies, to have been joined in and made by Hiram E. Casey, Esq., for Katie Eustace, H. E. Casey, Esq., to have the benefit of all of the objections and exceptions made by Ed. W. Tuttle; this order is made without prejudice to Mr. Tuttle in behalf of his client Charles W. Fourl;

The Court makes a statement, finds Katie M. Eustace and Charles W. Fourl Guilty of contempt, and sentence is continued to Monday, September 24, 1934, at 11 o'clock a. m.

[Title of Court and Cause.]

ORDER IN RE CONTEMPT.

The petition of E. A. Lynch, Receiver in Bankruptcy herein, and the order to show cause thereon directed to Katie M. Eustace and Charles W. Fourl, came on for hearing in the court room of the Honorable George Cosgrave, District Judge, on September 12th, 1934, at the hour of 2:00 o'clock P. M., E. A. Lynch, Receiver, appearing in person and by Raphael Dechter, attorney at law, and Katie M. Eustace appearing in person and by Hiram E. Casey, attorney at law, Charles W. Fourl not appearing, it appearing to the court that service was not effected upon such respondent, and the Court having made its order dated September 13, 1934, adjudging Katie M. Eustace in contempt, and having on its own motion directed an order to show cause to issue to Charles W. Fourl why he should not be adjudged in contempt for the same matters recited in the petition upon which the order of September 13, 1934, was based, and the matter having come on regularly for hearing on Friday, September 21, 1934, and Saturday, September 22, 1934, the Receiver, E. A. Lynch, appearing in person and by his attorney, Raphael Dechter, and Raphael Dechter also appearing on behalf of the court, and the respondent, Charles W. Fourl, appearing in person and by his attorney, Edward W. Tuttle, Katie M. Eustace also being present, together with her attorney, Hiram E. Casey, and the matter having been fully heard, argued and submitted, and upon the submission of the hearing as against Charles W. Fourl, it having been stipulated at the request of Katie M. Eustace that the order of September 13, 1934, might be vacated so that the evidence introduced as the

basis of the order of September 13, 1934, might be deemed and considered supplemented by the evidence introduced on the hearing on Charles W. Fourl and Katie M. Eustace having the benefit of any and all objections and exceptions made on behalf of Charles W. Fourl insofar as it may be applicable to Katie M. Eustace and the matter having been submitted as to both Katie M. Eustace and Charles W. Fourl, the court now finds as follows:

That E. A. Lynch was appointed as Receiver in Bankruptcy herein on September 7, 1934, and duly qualified as such Receiver on September 10, 1934; that on September 10, 1934, at 11:45 A. M. said Receiver went to the premises at which the above named bankrupt was carrying on business, to-wit, 1246 East 9th Street, in the City of Los Angeles; that said Receiver was accompanied by J. C. Keenan and W. D. Hunt at said time; that upon arrival at said premises said Receiver found in charge of said premises one J. G. Stevenson, who had been working for the alleged bankrupt for a period of seventy weeks; that the bankrupt for approximately seventy weeks prior to the appointment of said Receiver had in her possession the keys to said premises, the management of said business, and direction of said business; that said J. G. Stevenson was employed by said Katie M. Eustace and received his compensation from said Katie M. Eustace; that in the operation of said business said Katie M. Eustace carried the bank account of the business in the name of the bookkeeper, J. G. Griffith, in which bank account she caused to be deposited the income from said business; that said J. G. Griffith would sign checks in blank and deliver the same to the bankrupt for use by her as she saw fit; that at the time of the hearing of the order

to show cause herein the said bankrupt had in her possession five checks signed by said J. G. Griffith on the Hancock Park Branch of the California Bank of Los Angeles, which said checks were undated and not filled in, with the exception of the signature of said J. G. Griffith; that said bank account was used by said bankrupt for her personal use, such as the payment of personal expenditures and her individual obligations; that a certified copy of the order appointed the Receiver was delivered by said Receiver to said J. G. Stevenson; that about 12:00 o'clock noon on September 10, 1934, the bankrupt appeared at the above address, accompanied by said Charles W. Fourl, attorney at law; that a certified copy of the order appointing E. A. Lynch as Receiver herein was handed by said E. A. Lynch, the Receiver, to said alleged bankrupt and to said Charles W. Fourl; that said bankrupt and said Charles W. Fourl demanded and directed that said Receiver quit and abandon the possession of said premises; that said Receiver advised said bankrupt and said Charles W. Fourl that in view of the fact that the bankrupt was in control thereof that he as Receiver succeeded to such possession and control and that if they felt that the Receiver should not remain in possession of said premises that they should file a petition with the above Court; that said bankrupt and Charles W. Fourl threatened and ordered said Receiver to quit said premises, notwithstanding such information by the Receiver; that said Receiver was barred from entrance to a room on the mezzanine floor on said premises to which the bankrupt had the keys; that said bankrupt refused to surrender said keys to the premises and to said locked storeroom on said mezzanine floor; that about 4:45 P. M. on September 10, 1934, said bankrupt called

her attorney of record, Hiram E. Casey, and thereafter requested that the Receiver talk to said Hiram E. Casey; the Receiver did talk to said attorney, Hiram E. Casey, and said attorney advised said Receiver that he was going to instruct the bankrupt to use all force necessary to evict him from said premises; that the Receiver said he would thereupon call his attorney for advice and that said Hiram E. Casey thereon instructed Mrs. Eustace, the alleged bankrupt, to prohibit the use of said telephone by the Receiver; that thereafter said bankrupt and said Charles W. Fourl refused to permit the Receiver to use the telephone on said premises and by force and violence ejected said Receiver from said premises and by their conduct demonstrated that they would violently and forcibly resist any attempt on the part of the Receiver to re-enter said premises; that said bankrupt personally locked the door in the face of said Receiver with the keys she had in her possession at the time of his eviction; that said Charles W. Fourl at all times herein knew that Katie M. Eustace was in the possession and control of the above mentioned premises.

As conclusions from the foregoing findings of fact, the Court advises that at the time of the filing of the petition in bankruptcy herein and at the time of the appointment of said Receiver that said Katie M. Eustace was in possession and control of the business being conducted at 1246 East 9th Street, Los Angeles; that the Receiver herein is entitled to the possession of said premises and the business conducted thereon.

IT IS THEREFORE ORDERED that said E. A. Lynch, as Receiver be, and he hereby is restored to the possession of said premises and the business conducted thereon at 1249 East 9th Street, Los Angeles, and that

said bankrupt and Charles W. Fourl and any and all persons, their agents and employees are hereby restrained as more fully set forth in the order appointing Receiver from in any wise interfering with the possession of said Receiver.

IT IS FURTHER ORDERED that said alleged bankrupt, Katie M. Eustace, and Charles W. Fourl, wilfully and deliberately violated the order of this Court appointing a receiver in bankruptcy herein and that said Katie M. Eustace and Charles W. Fourl committed a contempt by reason thereof of the above Court.

DATED: This 25th day of September, 1934.

Geo. Cosgrave
District Judge.

Let the foregoing order be filed nunc pro tunc as of Sept. 22, 1934.

Geo. Cosgrave
District Judge

[Endorsed]: Received copy of the within unsigned order this 25 day of Sept. 1934 but refuse to consent to form or regularity of said order, as an appeal has been perfected. Further reasons will be presented pursuant to Rule. Hiram E. Casey Attorney for K. M. Eustace. Received copy of the within unsigned order this 25th day of Sept. 1934 but refuse to consent to form or regularity of said order, which are disapproved, and also for the reason that an appeal has been perfected and is pending. Further reasons will be presented pursuant to Rule. Sept 25 – 1934. Edward W. Tuttle Attorney for Chas. W. Fourl. Filed R. S. Zimmerman Clerk at 16 min. past 5 o'clock Sep. 25, 1934 P. M. nunc pro tunc Sep. 22, 1934, By L. B. Figg, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif., on Monday, the 24th day of September, in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable: GEO. COSGRAVE, District Judge.

In the Matter of	)	
	)	
KATIE M. EUSTACE, etc.,	)	No. 23770-C Bkcy.
	)	
Alleged Bankrupt.	)	

This matter coming before the Court at this time for sentence upon Charles W. Fourl and Katie M. Eustace for contempt of court; Raphael Dechter, Esq., appearing for the Trustee; Edward W. Tuttle, Esq., appearing as counsel for Charles W. Fourl, and Hiram E. Casey, Esq., appearing for Katie M. Eustace, and Albert Bargion being present as court reporter;

The said E. W. Tuttle, Esq., makes a statement to the Court and objects to the jurisdiction of the Court, and R. Dechter, Esq., having made a statement, it is by the Court ordered that the objections made in behalf of Charles W. Fourl to the jurisdiction of the Court be, and the same are hereby overruled and exception noted;

and E. W. Tuttle, Esq., having thereupon moved the Court to dismiss this matter as to Charles W. Fourl, said motion is denied and exception noted; and H. E. Casey, Esq., having thereupon made a statement to the Court and adopted the proceedings in behalf of Katie M. Eustace that were taken by E. W. Tuttle, Esq., it is by the Court ordered that his objections to the jurisdiction of the Court and the motion to dismiss be overruled and denied, and exception noted; and the Court having made a statement, it is now by the Court ordered that Charles W. Fourl pay unto the United States of America a fine in the sum of $1000.00 and stand committed to the custody of the United States Marshal until said fine shall have been paid; and E. W. Tuttle, Esq., having thereupon given oral notice of appeal and asked the Court to fix bond on appeal, it is ordered that the appeal bond of Charles W. Fourl be fixed in the sum of $5000.00; and

With reference to the contempt of Katie M. Eustace relative to the key, she is placed in the custody of the U. S. Marshal to be held by him in the Orange County Jail until such time as she is willing to place the lock upon the premises in these proceedings at 1246 East 9th Street in such condition that the key that is now in possession of the Receiver opens it and as soon as she expresses a willingness to do that, she will notify the U. S. Marshal, and when that is completely done, she may apply for a release and to be purged of the contempt; and sentence on the other matter, the first matter upon which she was adjudged in contempt, is continued one week.

This matter also coming before the Court at this time for hearing on (1) motion of Katie M. Eustace to vacate order of examination under Section 21-A Bankruptcy Act; and (2) motion of Katie M. Eustace to vacate and set aside order appointing E. A. Lynch Receiver; both of said motions being filed on September 20th, 1934; Hiram E. Casey, Esq., appearing for the petitioner, makes a statement to the effect that Katie M. Eustace has restored the lock, that Receiver is now in possession, that the key now fits lock on the door, and the Court thereupon orders that contempt citation against Katie M. Eustace in this respect be dismissed, and Katie M. Eustace is ordered released from custody; whereupon, H. E. Casey, Esq., argues respectively in support of said motion to vacate order appointing Receiver, and motion to vacate order of examination; R. Dechter, Esq., argues in opposition thereto, and thereafter, both of said motions of Katie M. Eustace are denied and exception noted.

At a stated term, to wit: The September Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif., on Monday, the 1st day of October, in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable: GEO. COSGRAVE, District Judge

In the Matter of	)	
	)	
Katie M. Eustace, etc.,	)	No. 23770-C Bkcy.
	)	
Alleged Bankrupt.	)	

This matter coming on for sentence of Katie M. Eustace for contempt; Hiram E. Casey, Esq., appearing for said Katie M. Eustace, who is present in court, and

It is the judgment of the Court that Katie M. Eustace, heretofore adjudged in contempt, pay unto the United States of America a fine in the sum of one thousand ($1000.) dollars and stand committed to the Orange County Jail until fine is paid; and she is meanwhile remanded to custody;

A motion by H. E. Casey, Esq., for stay of execution is denied.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF Katie M. Eustace, etc., Alleged Bankrupt.	)	
	)	No. 23770-C
E. A. LYNCH Receiver of Katie M. Eustace, etc., Petitioner	)	PETITION TO ALLOW APPEAL AND TO FIX BOND
Vs.	)	
CHAS. W. FOURL, Respondent.	)	

Chas. W. Fourl, having filed his Notice of Appeal herein from an order adjudging him in contempt of the above entitled court, pursuant to petition of E. A. Lynch and order to show cause thereon, dated and filed September 11, 1934, in the above entitled matter, accompanied by his Assignment of Errors in the above entitled matter, now prays the Court that his appeal be allowed and that an order fixing his bond on appeal staying proceedings and for costs be made.

Dated: September 24th, 1934.

Chas W. Fourl
(Chas. W. Fourl)

Hiram E. Casey
Edward W Tuttle
Attorneys for Chas. W. Fourl

[Endorsed]: Filed R. S. Zimmerman, Clerk at 2 min. past 12:00 o'clock Sep. 24, 1934 P. M. By L. B. Figg, Deputy Clerk

[Title of Court and Cause.]

NOTICE OF APPEAL

To E. A. Lynch, alleged Receiver in Bankruptcy in the above entitled matter and to his attorney, Ralphael Dechter:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE, that Chas. W. Fourl hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the above entitled court adjudging said Chas. W. Fourl to be in contempt thereof, pursuant to petition of E. A. Lynch and order to show cause thereon, dated and filed herein September 11, 1934, entered in the above entitled action in the District Court of the United States for the Southern District of California, Central Division, on the 24th day of September, 1934, whereby it was adjudged that Chas. W. Fourl pay a fine in the sum of one thousand dollars and be committed to the custody of the Marshal until he pays the same.

A certified transcript of the record will be filed in the said Appellate Court within the period prescribed by the Citation herein or within the time allowed by stipulation.

Dated: September 24, 1934.

Hiram E. Casey
Edward W Tuttle
Attorneys for Chas. W. Fourl

[Endorsed]: Filed R. S. Zimmerman, Clerk at 2 min. past 12:00 o'clock Sep. 24, 1934 *A*. M. By L. B. Figg, Deputy Clerk

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Chas. W. Fourl having petitioned for an order from the above entitled court permitting him to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the order and judgment of conviction in and against him in this case, and Chas. W. Fourl having duly given notice of appeal as provided by law, now makes and files with his petition for appeal the following assignment of errors upon which he will rely for a reversal of the judgment upon appeal and which said errors, and each of them, are to the great detriment, injury and prejudice of Chas. W. Fourl and in violation of the rights conferred upon him by law; and Chas. W. Fourl says that, in the record and proceedings in this cause, upon the hearing and determination thereof in the Central Division of the United States District Court for the Southern District of California, there is manifest error in this, to-wit:

I

The court erred in overruling the motion of Chas. W. Fourl to dismiss the petition and order to show cause in re contempt and restoration of possession.

II

The court erred in permitting the proceedings instituted and tried as civil proceedings to go to final judgment in criminal contempt.

III

The court erred in finding Chas. W. Fourl guilty of criminal contempt on evidence produced in a civil proceeding.

IV.

The court erred in finding Chas. W. Fourl guilty of a criminal contempt without any charge in criminal contempt ever having been brought against him.

V

The court erred in exercising criminal jurisdiction in a civil proceeding in which no criminal jurisdiction exists.

VI

The court erred in finding Chas. W. Fourl guilty of a criminal offense against the United States of America in an action in which the United States of America is not now nor ever has been a party.

VII

The court erred in refusing to dismiss the whole proceedings against Chas. W. Fourl upon the conclusion of the entire case.

VIII

The court erred in finding Chas. W. Fourl guilty of contempt and sentencing him to ..... days in jail.

IX

The court erred in finding Chas. W. Fourl guilty of contempt upon evidence received and considered by the court from persons not under oath and not in the presence of the respondent, Chas. W. Fourl, to-wit, evidence taken at a hearing as to Katie *E.* Eustace on the same order but prior to service on, or appearance by appellant,

at which hearing appellant was not present or represented, to the effect that Katie M. Eustace was running the plumbing business at 1246 E. Ninth St., paying the bills from money kept in the name of a stranger, and carried in her possession signed checks on such bank account.

X

The court erred in finding Chas. W. Fourl guilty of contempt upon the evidence of witnesses with whom the said Chas. W. Fourl was not confronted and which witnesses he was not afforded an opportunity of cross-examining.

XI

The court erred in the admission and rejection of evidence in this, that the court rejected the proof offered by Chas. W. Fourl with respect to the marital status of the alleged bankrupt and with respect to the ownership of the property concerning which these proceedings were instituted.

XII

The court erred in finding Chas. W. Fourl guilty of criminal contempt and in sentencing him to be imprisoned on proceedings founded upon an affidavit and an order to show cause which is not sufficient in form or substance to warrant a proceeding in criminal contempt.

XIII

The court erred in the admission and rejection of evidence in this, that he admitted the hearsay declarations of J. G. Stevenson as to who hired and paid him, as to who was in charge of and who owned the plumbing business at 1246 E. Ninth Street, and of John Eustace, Jr., and hearsay statements not made in the presence of Chas. W. Fourl.

XIV

The court erred in finding Chas. W. Fourl guilty of contempt and adjudging him guilty of contempt on evidence which is wholly insufficient to justify such finding and such sentence.

XV

The court erred in finding Chas. W. Fourl guilty of criminal contempt and sentencing him when the order appointing the receiver in the above entitled matter did not direct such receiver to take possession of the property concerning which the said Chas. W. Fourl is found guilty of contempt.

XVI

The court erred in permitting the petitioner to call and examine appellant as a witness against himself.

XVII

The court erred in overruling the special appearance of Chas. W. Fourl and his objection to the jurisdiction of this Court to try this matter and his objection to the summary procedure which seeks to try title to and the right to possession to property belonging to and in the possession of strangers to this bankruptcy proceeding and which seeks in such summary proceeding to charge Chas. W. Fourl with a contempt as the agent of such a stranger to said bankruptcy proceedings.

XVIII

The court erred in assessing against appellant an excessive fine without any evidence showing the amount of the damage or injury to the petitioner.

XIX

The court erred in sustaining objection to appellant's offer to prove that the plumbing business, concerning

which the alleged contempt was committed, had been owned and operated by John M. Eustace, husband of Katie M. Eustace, prior to their marriage in 1904 and continuously ever since, and that she merely assisted him in it and had never put any money in it or acquired any right in it except a community property interest; that Katie M. Eustace was never a sole trader nor qualified or licensed as a Master plumber, and that the license for conducting the plumbing business at 1246 East Ninth Street was and is held by John M. Eustace.

XX

The court erred in refusing to grant appellant a full and fair trial on the merits herein, in refusing to allow appellant to properly examine and cross-examine witnesses produced against him, and by compelling the trial to proceed at irregular hours and intervals, and by compelling a hurried and limited hearing of the said trial.

XXI

The court erred in sustaining objection to appellant's offer to prove by the witness E. A. Lynch that before attempting to take possession of the plumbing business at 1246 East Ninth Street said E. A. Lynch knew that said business was not in the possession of nor owned by Katie M. Eustace but belonged and had always belonged to her husband, John M. Eustace.

Hiram E. Casey
Edward W. Tuttle
Attorneys for Chas. W. Fourl Appellant

[Endorsed]: Filed R. S. Zimmerman, Clerk at 2 min. past 12:00 o'clock Sep. 24, 1934 *A.* M. By L. B. Figg, Deputy Clerk

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

This cause coming on to be heard upon motion of Chas. W. Fourl, for an order granting him an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from an order adjudging him in contempt of the above entitled court in the above entitled matter, pursuant to petition of E. A. Lynch and order to show cause thereon, filed and dated September 11, 1934, and the same having been considered by the court and good cause appearing therefor,

IT IS ORDERED AND ADJUDGED that said appeal be and the same is hereby allowed to the Circuit Court of Appeals of the United States for the Ninth Circuit.

AND IT IS FURTHER ORDERED that the bond of Chas. W. Fourl on appeal is hereby fixed in the sum of $250.00 for cost on appeal.

Done and Ordered in open Court at Los Angeles, California, this 24th day of September, 1934.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 3 min. past 12:00 o'clock Sep. 24, 1934 *A.* M. By L. B. Figg, Deputy Clerk

[Title of Court and Cause.]

BOND FOR COSTS APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Chas. W. Fourl, as principal, and Fidelity and Deposit Company, of Maryland, a corporation, existing under the laws of the State of Maryland, and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Baltimore, Maryland, as Surety, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred and Fifty Dollars ($250.00), in lawful money of the United States to be paid to the said United States for which payment well and truly to be made we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed and sealed this 25th day of September, 1934.

The condition of this obligation is such that whereas the above named Chas. W. Fourl, the appellant herein, has appealed or is about to appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment and sentence of contempt herein, made and entered against respondent and appellant Chas. W. Fourl in the above entitled court and in the above entitled action on or about the 24th day of September, 1934;

NOW THEREFORE, in consideration of the premises and of such appeal if the said appellant shall prose-

cute his appeal to effect and pay all costs that may be adjudged against him if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Signed, sealed and dated this 25th day of September, A. D. 1934.

Chas. W. Fourl

Principal

(Seal) FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By W. M. Walker
(W. M. Walker)
Attorney in Fact

Attest: Theresa Fitzgibbons
(Theresa Fitzgibbons)
Agent.

[Seal]

Examined and recommended for approval in accordance with Rule 28.

Edward W. Tuttle
Attorney at Law.

THE FOREGOING BOND IS HEREBY APPROVED.

Dated: September 26, 1934.

Geo. Cosgrave
United States District Judge.

STATE OF CALIFORNIA)
County of Los Angeles) ss:

On this 25th day of September, 1934, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent respectively.

[Seal] S. M. Smith

Notary Public in and for the State of California, County of Los Angeles.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 32 min. past 9:00 o'clock Sep. 26, 1934 A. M. By L. B. Figg, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF Katie M. Eustace, etc., Alleged Bankrupt	
E. A. LYNCH Receiver of Katie M. Eustace, etc., Petitioner, vs. Katie M. Eustace, Respondent.	No. 23770-C PETITION TO ALLOW APPEAL AND TO FIX BOND.

Katie M. Eustace, having filed her Notice of Appeal herein from an order adjudging her in contempt of the above entitled court, pursuant to petition of E. A. Lynch and order to show cause thereon, dated and filed September 11, 1934, in the above entitled matter, accompanied by her Assignment of Errors in the above entitled matter, now prays the Court that her appeal be allowed and that an order fixing her bond on appeal staying proceedings and for costs be made.

Dated: October 1st, 1934.

Katie M. Eustace
(Katie M. Eustace)

Hiram E Casey
(Hiram E. Casey)
Attorney for Katie M. Eustace.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27 min. past 3:00 o'clock Oct.-1, 1934 P. M. By F. Betz, Deputy Clerk

[Title of Court and Cause.]

NOTICE OF APPEAL

To E. A. Lynch, Alleged Receiver in Bankruptcy in the above entitled matter and to his attorney, Raphael Dechter:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that Katie M. Eustace hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the above entitled court adjudging said Katie M. Eustace to be in contempt thereof, pursuant to petition of E. A. Lynch and order to show cause thereon, dated and filed herein September 11, 1934, entered in the above entitled action in the District Court of the United States for the Southern District of California, Central Division, on the 1st day of October, 1934, whereby it was adjudged that Katie M. Eustace pay a fine of the sum of One Thousand ($1000.00) Dollars

A certified transcript of the record will be filed in the said Appellate Court within the period prescribed by the Citation herein or within the time allowed by stipulation.

Dated: October 1st, 1934.

Hiram E. Casey

Attorney for Katie M. Eustace.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 28 min. past 3:00 o'clock Oct-1, 1934 P. M. By F. Betz, Deputy Clerk

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Katie M. Eustace having petitioned for an order from the above entitled court permitting her to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit from the judgment of conviction in and against her in this case pursuant to Petition of E. A. Lynch and Order to Show Cause dated September 11, 1934, and Katie M. Eustace having duly given notice of appeal as provided by law, now makes and files with her petition for appeal the following assignment of errors upon which she will rely for a reversal of the judgment upon appeal and which said errors, and each of them are to the great detriment, injury and prejudice of Katie M. Eustace and in violation of the rights conferred upon her by law; and Katie M. Eustace says that, in the record and proceedings in this cause, upon the hearing and determination thereof in the Central Division of the United States District Court for the Southern District of California, there is manifest error in this, to-wit:

I.

The court erred in overruling the motion of Katie M. Eustace to dismiss the petition and order to show cause in re contempt and restoration of possession.

II.

The court erred in permitting the proceedings instituted and tried as civil proceedings to go to final judgment in criminal contempt.

III.

The court erred in finding Katie M. Eustace guilty of criminal contempt on evidence produced in a civil proceeding.

IV.

The court erred in finding Katie M. Eustace guilty of a criminal contempt without any charge in criminal contempt ever having been brought against her.

V.

The court erred in exercising criminal jurisdiction in a civil proceeding in which no criminal jurisdiction exists.

VI.

The court erred in finding Katie M. Eustace guilty of a criminal offense against the United States of America in an action in which the United States of America is not now nor ever has been a party.

VII.

The court erred in refusing to grant appellant's motion to dismiss the whole proceedings against Katie M. Eustace upon the conclusion of the entire case.

VIII.

The court erred in finding Katie M. Eustace guilty of contempt in sentencing her to ..... days in jail.

IX.

The court erred in finding Katie M. Eustace guilty of contempt and in adjudging her guilty of contempt on proceedings founded upon an affidavit and an order to show cause which contains an insufficiency of statement of facts to justify a proceeding in contempt.

X.

The court erred in the admission and rejection of evidence in this, that the court admitted the hearsay declarations of J. G. Stevenson and John Eustace, Jr. and hearsay testimony and statements not made in the presence of Katie M. Eustace.

XI.

The court erred in finding Katie M. Eustace guilty of contempt and adjudging her guilty of contempt on evidence which is wholly insufficient to justify such finding and such judgment.

XII.

The court erred in finding Katie M. Eustace guilty of contempt and adjudging her guilty of contempt when the order appointing the receiver in the above entitled matter did not direct such receiver to take possession of the property concerning which the said Katie M. Eustace is found guilty of contempt.

XIII.

The court erred in making and issuing its order to show cause returnable in one day and upon return day thereof refusing Katie M. Eustace a reasonable time and opportunity within which to prepare and file a written appearance and answer to the said petition herein, and refusing Katie M. Eustace a reasonable time within which to procure necessary witnesses on her behalf, and in proceeding forthwith to trial without any notice thereof.

XIV.

The court erred in refusing to grant to Katie M. Eustace a full and fair trial on the merits herein in refusing to allow the said Katie M. Eustace to procure and have present at all times in the trial of the matter herein, a court reporter, official, or any shorthand reporter to report and preserve the hearing of the said proceedings, and in this that the said court refused the said Katie M. Eustace a full and fair trial in compelling the said trial to proceed to trial at irregular hours and intervals and in compelling a hurried and limited hearing of the trial and proceedings and without a full and clear understanding either of court, counsel or Katie M. Eustace as to whether the hearings and proceedings taken by the court were in the matter of Katie M. Eustace and pertained to her trial or to some other proceedings before the court.

XV.

The court erred in refusing to admit the offer of Katie M. Eustace to produce witnesses to testify to the facts set forth and stated to the court on her offer of proof to produce witnesses to testify thereto and in ruling that the said evidence so offered would not be admissible or received.

XVI.

The court erred in holding the evidence sufficient to convict Katie M. Eustace guilty of a contempt.

XVII.

The court erred in denying the Motion of Katie M. Eustace to dismiss the proceeding against her because of the insufficiency of the evidence to support the charge of contempt.

XVIII

The court erred in assessing the appellant with a large and excessive fine without any evidence showing the amount, if any, damage or injury to the petitioner.

XIX.

The court erred in permitting Katie M. Eustace, the alleged bankrupt, to be called and examined as a witness in said proceeding against herself, by the petitioner therein.

Hiram E. Casey
Attorney for Katie M. Eustace, Appellant.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 28 min. past 3:00 o'clock Oct-1, 1934 P. M. By F. Betz, Deputy Clerk

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

This cause coming on to be heard upon motion of Katie M. Eustace, for an order granting her an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from an order adjudging her in contempt of the above entitled court in the above entitled matter, pursuant to petition of E. A. Lynch and order to show cause thereon filed and dated September 11, 1934 and the same having been considered by the court and good cause appearing therefor,

IT IS ORDERED AND ADJUDGED that said appeal be and the same is hereby allowed to the Circuit Court of Appeals of the United States for the Ninth Circuit.

AND IT IS FURTHER ORDERED that the bond of Katie M. Eustace on appeal is hereby fixed in the sum of $250.00 for costs on appeal and $2500.00 for a supersedeas bond.

Done and Ordered in open Court at Los Angeles, California, this 1st day of October, 1934.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27 min. past 4:00 o'clock Oct-1, 1934 P. M. By Theodore Hocke, Deputy Clerk

[Title of Court and Cause.]

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS: That we, Katie M. Eustace, as principal, and Fidelity and Deposit Company of Maryland, a corporation, existing under the laws of the State of Maryland, and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Baltimore, Maryland, as Surety, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty Dollars ($250.00), in lawful money of the United States to be paid to the said United States for which payment well and truly to be made we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed and sealed this 4th day of October, 1934.

The condition of this obligation is such that whereas the above named Katie M. Eustace, the appellant herein, has appealed or is about to appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment and sentence of contempt herein, made and entered against respondent and appellant Katie M. Eustace in the above entitled court and in the above entitled action on or about the 1st day of October, 1934:

NOW THEREFORE, in consideration of the premises and of such appeal if the said appellant shall prose-

cute her appeal to effect and pay all costs that may be adjudged against her if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

Signed, sealed and dated this 4th day of October, A. D. 1934.

Katie M. Eustace

Principal

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By W. M. Walker

(W. M. Walker)

Attorney in Fact

Attest: Theresa Fitzgibbons

Agent

(Theresa Fitzgibbons)

[Seal]

Examined and recommended for approval in accordance with Rule 28.

Hiram E. Casey

Attorney at Law

THE FOREGOING BOND IS HEREBY APPROVED.

Dated: October 8 1934.

Wm. P. James

United States District Judge.

STATE OF CALIFORNIA)
County of Los Angeles) ss.

On this 4th day of October, 1934, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. Smith
Notary Public in and for the State of California, County of Los Angeles.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 49 min past 9:00 o'clock Oct.-8, 1934 A. M. By Theodore Hocke, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

JOINT PRAECIPE

To the Clerk of the above entitled Court:

You are hereby jointly requested by the undersigned, E. A. Lynch, as receiver in bankruptcy of Katie M. Eustace, alleged bankrupt, appellee, and by Charles W. Fourl, and Katie M. Eustace, appellants in the above entitled matter on their two respective appeals to the Ninth Circuit, from those certain orders of the above entitled Court entered in the minutes of said Court on the 22nd day of September, 1934 and the 1st day of October, 1934, respectively, to make a joint transcript of record for the said two appeals to be filed in the said United States Circuit Court of Appeals for the Ninth Circuit and to constitute the record on appeal in each of said two appeals and to include in the said transcript the following:

1. Petitioning Creditors' Original Involuntary Petition.

2. Petition for Appointment of Receiver.

3. Order Appointing E. A. Lynch Receiver.

4. Petition of E. A. Lynch for Order to Show Cause and Contempt dated September 11, 1934.

5. Petition for Appeals by Charles W. Fourl and Katie M. Eustace.

6. Notice of Appeals of Charles W. Fourl and Katie M. Eustace.

7. Assignments of Errors of Charles W. Fourl and Katie M. Eustace.

8. Orders Allowing Appeals of Charles W. Fourl and Katie M. Eustace.

9. Citations on Appeals in re Charles W. Fourl and Katie M. Eustace.

10. Costs Bonds of Charles W. Fourl and Katie M. Eustace.

11. Joint Praecipe.

12. Statement of Evidence on Appeals and Stipulation and Order Settling same.

13. Minute Order of September 22, 1934.

14. Minute Order of October 1, 1934.

15. Order to Show Cause in re Contempt and Restoration of Possession signed and filed September 11, 1934.

16. Answer of Charles W. Fourl to said Petition of E. A. Lynch in re Contempt and Restoration and to said Order to Show Cause.

17. Minute Order of September 24, 1934 containing judgment and sentence of the Court as to Charles W. Fourl, fining him for Contempt and committing him to custody of the Marshal until paid.

18. Minute Order of September 12, 1934.

19. Formal Order of Judge Cosgrave finding and adjudging Katie M. Eustace in Contempt, dated September 13, 1934.

20. Formal Order of Judge Cosgrave finding and adjudging Katie M. Eustace and Charles W. Fourl in Contempt, dated September 22, 1934.

R. Dechter
Attorney for the Receiver and for the Court

EDWARD W. TUTTLE AND
HIRAM E. CASEY by
Hiram E. Casey
Attorneys for Charles W. Fourl

Hiram E. Casey
Attorney for Katie M. Eustace

[Endorsed]: Filed May 16, 1935 at 11 o'clock A. M. R. S. Zimmerman, Clerk Theodore Hocke, Deputy.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 162 pages, numbered from 1 to 162 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation of Chas. W. Fourl; citation of Katie M. Eustace; involuntary petition in bankruptcy; petition for appointment of receiver; order appointing receiver; petition of E. A. Lynch, as receiver, for an order to show cause in re contempt; order to show cause; order of September 12, 1934 overruling demurrer to order to show cause; order of September 13, 1934; answer of Chas. W. Fourl to petition and order to show cause re contempt; statement of evidence; order of September 22, 1934 finding Katie M. Eustace and Chas. W. Fourl guilty of contempt; order in re contempt; order of September 24, 1934 containing judgment and sentence as to Chas. W. Fourl; order of October 1, 1934 containing judgment and sentence of Katie M. Eustace; petition for appeal, notice of appeal, assignment of errors, order allowing appeal and bond on appeal of Chas. W. Fourl; petition for appeal, notice of appeal, assignment of errors, order allowing appeal and bond on appeal of Katie M. Eustace and joint praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and

that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to ..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division this ..... day of June, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Fifty-ninth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 7889

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
KATIE M. EUSTACE, etc.,
Alleged Bankrupt.

Katie M. Eustace and Chas. W. Fourl,
Appellants,
vs.
E. A. Lynch, etc.,
Appellee.

BRIEF OF APPELLANT KATIE M. EUSTACE.

HIRAM E. CASEY,
Title Ins. Bldg., 433 S. Spring St., Los Angeles,
CHAS. W. FOURL,
Detwiler Bldg., 412 W. Sixth St., Los Angeles,
Attorneys for Appellant Katie M. Eustace.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

No. 7889

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
KATIE M. EUSTACE, etc.,
Alleged Bankrupt.

Katie M. Eustace and Chas. W. Fourl,
Appellants,

vs.

E. A. Lynch, etc.,
Appellee.

BRIEF OF APPELLANT KATIE M. EUSTACE.

STATEMENT OF FACTS.

This is an appeal from a judgment entered in the District Court of the United States for the Southern District of California, Central Division, by the Honorable Judge Cosgrave, in proceedings instituted within and *entirely conducted within* the above entitled bankruptcy matter, adjudging appellant to be in contempt of court [p. 128] and sentencing appellant to pay unto the UNITED STATES OF AMERICA a fine in the sum of one thousand dollars ($1000) and stand committed to custody until said fine shall have been paid [p. 137].

The following facts appear from the record:

On August 24, 1934, one A. M. Kupfer, a partner of Katie M. Eustace in an oil well venture, having a judgment of $49.95 [p. 7] against said Katie M. Eustace, joined with two other alleged creditors of said Katie M. Eustace on claims relating to the oil well and filed an involuntary petition in bankruptcy against Katie M. Eustace, alleged to be doing business as the Eustace Plumbing Company [Tr. p. 6].

It was stipulated on the hearing that none of said petitioning creditors were creditors of the Eustace Plumbing Company and that their claims had nothing to do with said Eustace Plumbing Company [p. 112] but "related to an oil well in which Mrs. Eustace and Mr. Kupfer were partners" [p. 108].

The involuntary petition is fatally defective in its jurisdictional facts but nevertheless this same partner alone, on his $49.95 claim [p. 108] on Sept. 7, 1934, filed a petition for a receiver [p. 13] for the alleged bankrupt, alleged to be doing business as the Eustace Plumbing Company [p. 11] and upon such petition *ex parte* and without notice, an order appointing a receiver of Katie M. Eustace, doing business as the Eustace Plumbing Company, was made [p. 13].

The order was general in its nature, described no particular property [p. 13], and required the petitioning creditor to put up a bond of only $500. [p. 11].

For more than thirty years the husband of Katie M. Eustace had conducted a plumbing business at various places in Los Angeles, and at the time herein involved had two locations within said city—one at 1246 East Ninth street and one on La Brea avenue [p. 95]. Said

husband, John M. Eustace, had filed a certificate of fictitious name which was published as required by law [p. 92] showing that he was doing business at these two locations under the name and style of "Eustace Plumbing Company."

Immediately upon qualification said receiver proceeded to 1246 East Ninth street, Los Angeles, where the "Eustace Plumbing Company" was doing business, and found there no one but a man named Stevenson working on a grinding machine, reconditioning some second-hand machinery [p. 53]. The receiver talked to the workman for a while and in about an hour the alleged bankrupt, Katie M. Eustace, and Chas. W. Fourl, appellants herein, appeared at the said East Ninth Street shop of the "Eustace Plumbing Company" [p. 54]. The receiver testified he gave the alleged bankrupt a copy of his order of appointment and demanded possession [p. 54]. It is admitted by all parties that thereupon appellants herein informed said receiver that John M. Eustace, the husband of Katie M. Eustace, was the owner of said business and had been such for more than thirty years [pp. 54, 61, 99], and that he had filed a certificate of fictitious name in the county clerk's office, which he had published according to law [p. 94]. Said certificate was read to said receiver by one of his men from the La Brea Street shop [p. 70].

Before this time, when appellee was on his way to the shop at East Ninth street, to demand possession, the said receiver met one Hiram E. Casey, an attorney, whom said receiver knew represented Katie M. Eustace [p. 40] and feeling the information would afford Casey a "good laugh," the receiver informed him that he was about to "CRASH" Mrs. Eustace [p. 39] but did not inform him

that proceedings had been started or of said receiver's appointment [p. 40]. Said Casey thereupon told the said receiver that he should stay away from the store of the Eustace Plumbing Company, that Katie M. Eustace had no interest in the business of the Eustace Plumbing Company, and directed his attention to the fact that if he went to the public records he would find a certificate of fictitious name, duly signed and filed and published showing John M. Eustace, the husband, was the owner of said "Eustace Plumbing Company" [p. 40]. Said receiver was also informed by appellants when he was at said place of business that a large amount of the equipment at said shop was owned by appellant Fourl which he had bought for use in construction of a large refinery at Long Beach and which he was then building [p. 57]. Said Chas. W. Fourl is, and was at all times, the attorney of John M. Eustace, authorized to do any and all things for and on his behalf, and so informed said receiver Lynch [p. 56].

Both the receiver and appellants remained at the store all afternoon of the day the receiver sought to take possession, the appellant Fourl telling him said receiver was a trespasser and an interloper and had no business there [pp. 56, 99], and that an examination of the order to show cause he had did not disclose he was entitled to take possession of this business [p. 99] claimed by, in possession of and owned by John M. Eustace. The receiver's attention was directed to the fact that the order required third persons to deliver possession of property in their possession only when the property was held by such party as agent or servant of Katie M. Eustace, and was owned by said alleged bankrupt [p. 99]. Much conversation took

place, the receiver saying he was going to remain there, the appellants telling him he was a trespasser and would have to go at the close of business [pp. 56, 99].

At about 6 o'clock p. m. appellants told the receiver the store was going to be closed for the day and he would have to go. He said that he could not do this as he did not want to be subject to criticism and that said Fourl would have to put his hands on him and he would leave [p. 100]. No force or violence was used. The said Fourl thereupon put his arm around the receiver's waist, and the two then walked through the outer door together, after which the place was locked [p. 100]. As one party spontaneously stated this "looks like a spring dance" [p. 82].

The following morning, Sept. 11, 1934, appellee filed with the District Court a "Petition of Receiver for Order to Show Cause *in re* Contempt and Restoration of Possession" [pp. 16-19]. Thereupon the District Court issued its "Order to Show Cause" directed to both appellants requiring them—at 2 o'clock p. m. Sept. 12, 1934—to show cause "why an order should not be made declaring them in contempt for interfering with the possession of the receiver herein at the premises at 1246 East Ninth street, Los Angeles, California, and why an order should not be made restoring possession forthwith of said premises to your "receiver," etc. [p. 20].

Time for service of this order was shortened to one day [p. 20].

Service of this order was made on appellant a short time before the matter was called for hearing at 2 o'clock on Sept. 12 [p. 37]. No service had at that time been made on Chas. W. Fourl and he did not appear [p. 37].

Appellant was present with her attorney in response to the citation. Upon the call of the matter, her attorney requested from the court two or three days time within which to prepare, serve and file a motion directed to the petition, which request was denied by the court [p. 37]. Appellant's attorney then requested two or three days time within which to file an answer in writing, stating that the petition and order to show cause were a one-day petition and order and had just been served on appellant [p. 37]; this request was likewise denied [p. 37]. The record shows that counsel then noted an exception to both the refusal of the court of permission to file a motion and the refusal of the court to permit the filing of a written answer. As stated above, this was sometime after 2 p. m. [p. 37]. The court then took up other matters and returned to this matter about 3:15 p. m. the same afternoon.

When this matter was again called, appellant's attorney stated to the court that he had not had time for preparation of the said proceedings, and that he had not had time to prepare an answer. He suggested to the court that, inasmuch as the proceedings against Chas. W. Fourl were of a similar nature, it would seem advisable to continue the hearing against appellant and consolidate it with the other hearing. The court refused to accept the said suggestion and ordered the matter to proceed *forthwith* to trial as against appellant [p. 38]. Appellant's attorney then moved for a continuance on the ground that he had not had time or opportunity to subpoena or procure witnesses necessary and material for the defense of appellant, stating to the court the names of certain witnesses he desired to subpoena and have present [p. 38]. The court refused this request for continuance and ordered the trial

to proceed, to which ruling an exception was taken by appellant [p. 39]. Appellant's attorney then requested that a shorthand reporter or official court reporter be present to transcribe and preserve a record of the proceedings, but the court ordered the matter to proceed without a reporter, to which ruling a further exception was taken by appellant [p. 39].

Three witnesses were then examined, the receiver, one Stevenson, an employee of the Eustace Plumbing Company, and the alleged bankrupt. The receiver first took the stand and testified in detail as to his efforts to take over the place of business of the Eustace Plumbing Company on East Ninth street and the resistance he claimed to have encountered from appellant and her husband's attorney, Chas. W. Fourl [p. 39]. J. G. Stevenson, an employee of the Eustace Plumbing Company, was then called and testified [p. 40] as to a conversation with the receiver Lynch on the occasion when Lynch came there.

Appellant was next called as a witness by the receiver [p. 42]. As we have previously noted, she was denied an opportunity to prepare a motion directed to the petition filed by E. A. Lynch, which would have challenged the jurisdiction of the court to proceed in this summary manner. She was not allowed time to file an answer. She was not allowed to subpoena witnesses. She was not allowed to have a court reporter present, though her counsel prior to the commencement of the hearing had requested one. And she was placed on the stand as a witness for appellee without being informed as to the nature of the proceedings—whether civil or criminal—without being advised that the purpose of the proceeding was to punish her for a past act—without being advised of her constitutional right against self-incrimination. Had

the proceedings borne any indicia of criminal prosecution, appellant could not have been required to testify against herself, but she was called and examined exactly as any defendant in a civil proceeding might have been.

At 5:30 p. m. [Tr. p. 42] the court announced that it would be compelled to take an adjournment and that further proceedings in the pending matter against Katie M. Eustace would be suspended until the termination on the petition for contempt of the hearing against Charles W. Fourl. The court then adjourned [p. 44]. That was September 12, 1934.

As we shall contend, later in this brief, that any possible contempt committed by appellant was cured by her action in court at this hearing, we wish to here quote from the clerk's minutes of September 12th:

> "The receiver is instructed to take possession of the property, and the court having stated that if there is any interference with the receiver, the court will be inclined to be severe about it. Mrs. Eustace turns over the key to Receiver E. A. Lynch in open court, and Mr. Griffith having thereupon been instructed to turn over the books to Receiver Lynch, on motion of R. Dechter, Esq.; at the hour of 5:23 p. m. recess is declared" [p. 22].

The next day, September 13, 1934, a formal order finding appellant guilty of contempt was signed by Judge Cosgrave [Tr. pp. 23-26] which also directed delivery of possession of the business to the receiver. This order was subsequently set aside on Sept. 22, 1934, and a formal order containing many findings of fact, was made *nunc*

pro tunc on Sept. 24, 1934 [Tr. pp. 129-133] and the court thereupon found Katie M. Eustice guilty of contempt [p. 45]. On Sept. 22, 1934, it was stipulated that, if the court would set aside the order of Sept. 13, 1934, appellant Eustace would stipulate that the evidence offered and received in the Fourl matter should be considered as having been offered and received in appellant Eustace's matter, with the understanding that said appellant should have all the benefits of all the objections made and exceptions taken by counsel for Mr. Fourl [pp. 44-45]. The court said that the matter had been determined but notwithstanding he would receive the stipulation [p. 45]. The matter was forthwith submitted for decision and the court found appellant guilty of contempt. Time for sentence was fixed for the following Monday [p. 45]. On Sept. 24, 1934, sentence in the matter at bar was continued to October 1, 1934, when the following minute order was entered:

> "It is the judgment of the court that Katie M. Eustace, heretofore adjudged in contempt, pay unto the United States of America a fine in the sum of one thousand dollars ($1000.00) and stand committed to the Orange county jail until fine is paid; and she is meanwhile remanded to custody; [Tr. p. 137].
>
> "A motion by H. E. Casey, Esq., for stay of execution is denied" [p. 137].

By stipulation, the appeal taken by appellant from the judgment against her and the appeal taken by Chas. W. Fourl from the judgment against him are both brought up

on one consolidated record [p. 121]. From this record it is obvious that at no state of the proceedings was the UNITED STATES OF AMERICA brought in as a party. At no time did the United States District Attorney attend or take part in them. Yet appellant was sentenced to pay unto the UNITED STATES OF AMERICA a fine in the sum of ONE THOUSAND DOLLARS and stand committed to jail *until this fine was paid.* NOT *until the further order of the court,* but until paid, and she was remanded to immediate custody, without stay.

We might well rest here without citation of authority as we feel that a mere statement of the foregoing facts would indicate a reversal. However, an examination of the authorities which follow leaves no room for any doubt on the subject.

Questions Presented.

The questions presented and which will be argued in this brief may be stated as follows:

(1) Is a contempt proceeding entitled in a bankruptcy cause, conducted by counsel for the petitioning creditors and not by the United States District Attorney and praying that appellant be held in contempt of court and requiring possession of certain premises be restored to *the receiver* and for an injunction, a criminal proceeding in which appellant can be fined and required to pay a fine to the United States of America? Was not the sentence imposed appropriate only to a criminal contempt?

(2) The appointment of a receiver *ex parte,* where the procedings are fatally defective, and where petition fails to state any jurisdictional facts warranting such relief, is void, and no contempt is committed by resisting his efforts to take possession of property under such void appointment.

(3) Did the order in this cause [p. 13] appointing the receiver and giving him his authority and authorizing said receiver to take possession of all property owned by or in possession of said alleged bankrupt authorize said receiver to take possession of the business of John M. Eustace, appellant's husband, and an adverse claimant?

(4) Was not the cause herein so conducted as to deprive appellant of her constitutional rights in violation to the due process clause of the United States Constitution?

(5) Were not errors of law made in such hearing in the admission and rejection of evidence of such character as to prejudice the appellant and prevent HER from having a full and fair trial on the merits?

(6) If appellant herein was guilty of contempt, was such contempt not purged by her subsequent conduct?

ASSIGNMENTS OF ERROR TO BE NOTED.

Assignments of error numbered I to XIX, with the exception of VIII will be hereafter noted and argued and will be quoted under appropriate points.

POINT I.

Observance of Procedural Distinction Between Civil and Criminal Contempt Is Jurisdictional.

The lower court had no jurisdiction to impose a fine payable to the United States and order appellant to stand committed to jail until the fine is paid, in a contempt proceeding entitled in a bankruptcy proceeding, the United States not being a party, and the cause not being prosecuted either by information or indictment, but being conducted entirely by counsel for the receiver for whose benefit the proceedings were prosecuted.

In connection with this point we note the assignments of error numbered II, III, IV, V, VI and VII [pp. 151-152], all of which, in varying language, present the point. For convenience they are repeated here:

(No. II.) The court erred in permitting the proceedings instituted and tried as civil proceedings to go to final judgment in criminal contempt.

(No. III.) The court erred in finding Kate M. Eustace guilty of criminal contempt on evidence produced in a civil proceeding.

(No. IV.) The court erred in finding Katie M. Eustace guilty of a criminal contempt without any charge of criminal contempt ever having been brought against him.

(No. V.) The court erred in exercising criminal jurisdiction in a civil proceeding in which no criminal jurisdiction exists.

(No. VI.) The court erred in finding Katie M. Eustace guilty of a criminal offense against the United States of America in an action in which the United States of America is not now, nor ever has been, a party.

(No. VII.) The court erred in refusing to dismiss the whole proceedings against Katie M. Eustace upon the conclusion of the entire case.

It is our contention that the authorities hereinafter cited clearly establish the principle that proceedings to punish for constructive contempt must be either civil or criminal; that if the object sought is coercion or an enforced compliance with the court's order theretofore made, the proceeding must be instituted and conducted as a civil proceeding and that the punishment imposed shall be only such as is appropriate thereto, to-wit, imprisonment until the order of the court is complied with; that if the object sought is punishment for a past act, as in vindication of the court's authority, then the proceeding must be instituted, entitled and tried as a criminal proceeding, that is to say, the United States of America must appear as the complainant, the proceding must be instituted by the District Attorney, and that when punishment is imposed in *such* proceeding, then and only then can sentence be to a definite and fixed term of imprisonment or a definite sum as a fine.

Both the petition for an order *in re* contempt and restoration of possession [pp. 16-19] and the order to show cause *in re* contempt, issued thereon [p. 20] seek

three things: First, an adjudication of contempt against appellants; second, an order restoring possession of certain premises forthwith to the receiver; third, a restraining order against future interference with said premises, all of which are civil matters.

At the conclusion of the hearing as to the appellant, Katie M. Eustace, the court found her guilty of contempt verbally and on the same day entered a written order thereon [p. 23] finding her guilty of contempt and granting all civil relief prayed for in the order to show cause, which order of September 13, 1934, was later set aside as to appellant Katie M. Eustace and a new order *in re* contempt made, dated Sept. 25, 1934 [pp. 129-133], which confirmed all civil relief theretofore granted by the previous order. This order of Sept. 25, 1934, was directed to be entered *nunc pro tunc* as of Sept. 22, 1934 [p. 133].

This order which was in the nature of findings of fact and conclusions of law has no place in a criminal proceeding and could only be appropriate to a civil proceeding.

Indeed, the court's idea as to the character and nature of the proceedings is best indicated by the statement he made with respect to an objection to the admissibility of certain hearsay statements offered by the receiver. The court said:

> "No, that would be true in a case on trial but this is an *informal* hearing, understand. The court makes up his mind here from all the facts and circumstances produced" [p. 86].

The order to show cause, as pointed out, was made on Sept. 11, 1934, and returnable Sept. 12, 1934. What opportunity could one have for preparing one's case; sum-

mon witnesses, prepare pleadings for a criminal case? It was obviously originally intended by the attorneys as a turnover order. Appellant Eustace was caused to go to trial on the case on the day following the order to show cause, the court refusing her attorney a continuance to summon witnesses [p. 38] or time to prepare written pleadings [p. 38] and forced her to trial at once [p. 39] and also refused her a reporter [p. 39].

The foregoing gives this court somewhat of an idea as to the conduct of the proceedings as they were had in the lower court. The pleadings and orders in the case all show they were only in a civil cause.

Every paper and proceeding in this cause was entitled in, initiated in and prosecuted in the said bankruptcy proceeding, even including the sentence [p. 137]. The petition for an order to show cause *in re* contempt and restoration of possession [p. 16] was entitled in the bankruptcy matter of Katie M. Eustace, alleged bankrupt [p. 16] and was on behalf of E. A. Lynch, receiver in bankruptcy [p. 16], signed by E. A. Lynch [p. 16] and prayed for an order to show cause why Katie M. Eustace and Chas. W. Fourl should not be held in contempt of court for interfering with the possession of the receiver of certain premises and why possession of said premises should not be restored forthwith to such receiver [p. 16]. The order to show cause [p. 20] *in re* contempt recites it is upon petition of the receiver and follows the prayer of the petition seeking a declaration of contempt against Katie M. Eustace and Chas. W. Fourl and *restoration to the receiver of possession of said premises* [p. 20]. The receiver was represented by the attorney for the alleged creditor on the hearing [pp. 21, 22, 23; pp. 133-137; pp.

129-133] and the orders [p. 23, pp. 134-37] finding appellants guilty of contempt all are entitled in the bankruptcy proceeding and show such attorney and the receiver were the moving parties at all times. Nowhere does it appear the United States of America has any part in the proceedings. Neither the petition *in re* contempt, the order to show cause *in re* contempt [p. 20] nor any other paper in the cause indicate that it is sought to punish appellants by fine or otherwise for a criminal act.

The court at the conclusion of the "INFORMAL HEARING" found the appellants *guilty* of contempt and continued *sentence* to a certain date [p. 128]. When the time arrived for sentence of appellants the court treated the case as a criminal one, and sentenced appellant Chas. W. Fourl [pp. 134-135] to pay a fine of $1000 to the United States of America, and the same sentence was given to appellant Katie M. Eustace [p. 137]. No showing of damages or injury to anyone, such as would have been necessary had the proceeding been deemed a civil one, was either pleaded or proved.

A civil proceeding, initiated as such, conducted informally [p. 86] was thus at time of judgment and sentence treated as a criminal matter. This is such a variance between the procedure adopted, the conduct of the proceedings and the punishment imposed as to be a deprivation of substantial rights of the appellants. The leading case on this subject is *Gompers v. Bucks Stove, etc. Co.,* 221 U. S. 418, 444, wherein the court imposed imprisonment for contempt of court in violating an injunction in a civil suit but gave nothing to the Bucks Stove Company; the court said:

"If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or by appeal. Bessette v. Conkey, 194 U. S. 324. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. Boyd v. U. S., 116 U. S. 616; United States v. Jose, 63 Fed. Rep. 951; State v. Davis, 50 W. Va. 100; King v. Ohio Ry., 7 Biss. 529; Sabin v. Fogarty, 70 Fed. Rep. 482, 483; Drekeford v. Adams, 98 Georgia 724.

There is another important difference. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main case. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause. The Court of Appeals recognizing this difference held that this was not a part of the equity cause of the Bucks Stove & Range Company v. the American Federation of Labor *et al.*, and said that 'The order finding the defendants guilty of contempt was not an interlocutory order in the injunction proceedings. It was in a separate action, one personal to the defend-

ants, with the defendants on one side and the court vindicating its authority on the other.'

In this view we cannot concur. We find nothing in the record indicating that this was a proceeding with the Court, or more properly, with the Government, on one side and the defendant on the other. On the contrary, the contempt proceedings were instituted, entitled, tried, and up to the moment of sentence treated as a part of the original case in equity. The Bucks Stove & Range Company was not only a nominal, but the actual party on the one side, with the defendants on the other. The Bucks Stove Company acted throughout as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States, prosecuting the case for criminal contempt. It appears here also as the sole party in opposition to the defendants; and its counsel, in its name, have filed briefs and made arguments in this court in favoring affirmance of the judgment of the court below.

But, as the Court of Appeals distinctly held that this was not a part of the equity cause it will be proper to set out in some detail the facts on this subject as they appear in the record.

In the first place the petition was not entitled 'United States v. Samuel Gompers *et al.*' or *In re* Samuel Gompers *et al.*' as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought

to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charges against him, but to know that it is a charge and not a suit. U. S. v. Cruikshank, 92 U. S. 542, 559."

The same rule was applied in *In re Kahn,* 204 Fed. 581, 582. The court said:

"Applying then the principles of the Gompers Case it is evident that when it appears that a sentence to a fixed and absolute term of imprisonment has been imposed it can be justified only by showing that it was inflicted in a proceeding for criminal contempt. Such a punishment was imposed in this case. Nothing the defendant could have done would have prevented his imprisonment for the full term of ten days. That part of the punishment was to vindicate the authority of the court. The coercive part—the part to aid the complainant—did not become operative until after the punitive part had been complied with. The latter must be supported, if at all, by establishing that it was made in a criminal proceeding.

Were the proceedings criminal in their nature? The most important question bearing upon this as to whether they were between the public and the defendant. They were not. The government did not prosecute nor did anyone claim to act in its behalf. The complainant was the attorney for the receiver in bankruptcy and the contempt proceeding was really in favor of the latter. The petition was not entitled as in a criminal case. The order bore the title of

the main bankruptcy proceedings. The prayer for relief was for an adjudication in contempt and for further relief of the petitioner. All the indicia of the civil cause incidental to the proceedings in bankruptcy, and none whatever of a criminal case, were present. The situation was precisely that stated in the Gompers Case:

'A variance between the procedure adopted and punishment imposed, when in answer to a prayer for relief in the * * * (civil) cause the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt.' "

The decision of the Supreme Court of the United States in the *Gompers* case was held to be directly applicable to contempt cases arising in the bankruptcy courts by the 8th Circuit Court of Appeals in its decision of the case of *Wakefield v. Housel,* 288 Fed. 712, where the proceedings were instituted, entitled and tried as part of a bankruptcy matter, by counsel for the creditors.

In this case just mentioned the opinion of the Eighth Circuit drawns an analogy between the facts of the case there and the facts of the *Gompers* case. In the following quotation from that case we have drawn the analogy further to show that both decisions are clearly controlling in the case at bar:

"The question recurs: Was the proceeding which has been described, and upon which this judgment of criminal contempt is based, 'instituted and tried as for criminal contempt?' The Supreme Court noticed and specified these indications that the contempt proceeding in the Gompers case was not so instituted and tried: (1) That there was nothing in the record indicating that the court or the government was on one

side of the contempt proceedings and the defendants on the other. There is nothing in the case at hand so indicating." (*Nor is there anything in the record of the case at bar to so indicate.*) "(2) That the contempt proceedings were instituted, entitled and tried as a part of the original suit in equity. So was the contempt proceeding here. The referee's certificate of contempt, the petition to the District Court for the order to show cause, and the order of the court adjudging Wakefield in contempt were entitled: 'In the Matter of Butler-Williams-Wakefield Motor Company, a Copartnership Composed of E. M. Butler, R. L. Williams and S. L. Wakefield, and E. M. Butler, R. L. Williams and S. L. Wakefield, Individuals, Bankrubts. In Bankruptcy No. 1712.'" (*In the case at bar, the "Petition of Receiver for an Order to Show Cause in re Contempt and Restoration of Possession," the order to show cause, and the order of the Court adjudging appellant guilty of contempt were each entitled: "In the matter of Katie M. Eustace, etc., Alleged Bankrupt."*) "(3) That the Bucks Stove & Range Company, through its counsel, conducted the proceeding for the adjudication of contempt, not as a representative of the United States or of the Court, but for itself, and its counsel, in its name, filed briefs and made arguments for affirmance of the judgment in the appellate court. This is equally true of the trustee in bankruptcy and his counsel in this contempt proceeding against Wakefield."

And we may add, *it is equally true in this contempt proceeding.* This striking analogy between these cases should leave no doubt in the minds of this court as to the fatally defective character of the proceedings below. Additional definitions of and the distinctions between civil contempt and criminal contempt may be found in *In re*

Nevitt, 117 Fed. 448, 458, 54 C. C. A. 622, and *Bessett v. W. B. Conkey Co.,* 194 U. S. 324, 328, 24 Sup. Ct. 665, 48 L. ed. 997.

In a very recent case decided January 21, 1935, *In re Guzzardi,* 28 Am. B. R. (N. S.) 130, the Second Circuit Court of Appeals has reaffirmed its earlier decision of *In re Kahn,* 204 Fed. 481, and because of being so recent and its statement of principles involved we quote therefrom at length.

The court said (28 Am. B. Rep. (N. S.) 130:

> "The bankrupt appeals from an order of the bankruptcy court sentencing him to 60 days' imprisonment for contempt of court. The proceeding was commenced by an order to show cause, supported by the petition of the trustee in bankruptcy, both entitled in the bankruptcy proceeding. The order required the bankrupt to 'show cause why he should not be punished for contempt of court for interfering with the orders of this court and with the administration of the estate . . . and in concealing and inducing disobedience of the witnesses to the orders of this court and why he should not be directed to produce for examination . . . Josephine Quartucci, Caroline Quartucci and John Quartucci.' The petition stated its purpose in substantially similar form, speaking, however, of the production of the witnesses as 'additional or alternative relief.' It concluded with a prayer 'that the bankrupt should be punished for contempt of court and should be directed to produce his relatives as witnesses and that he be stayed and enjoined from interfering with the processes of this court and from harboring these witnesses.' The bankrupt filed an affidavit containing

argumentative denials of the petition, and the case went to trial before the judge. . . . The most important question is whether the proceeding was obviously criminal from the outset, or from a time early enough to advise him and protect his rights. To prove that it was, the trustee relied especially upon the process and the petition which asked that he be 'punished' for having interfered with the processes of the court, and upon the repeated declarations of the judge during the hearings that the proceeding was to 'punish' him for contempt. Again, he relied upon the reply to the court, after sentence, of the attorney for Caroline Quartucci acting apparently for the bankrupt, at the moment that he had assumed from the way the proceeding was going, that he would be imprisoned.

The great importance attached to the characterization as criminal of a proceeding to punish for contempt, dates from Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, before which the practice had been looser. The Supreme Court there set out the elements which persuaded it that that proceding had been civil. We read the opinion, not as making crucial any one detail, but rather as summing up the features of a portrait which as a whole was plainly recognizable. If so, our duty here is to learn how far the case at bar may be superimposed upon the facts there. That proceeding was prosecuted by the party aggrieved; it was apparently a part of the civil proceedings in chief, being so entitled; the plaintiff asked costs, and called the respondents to the stand; there was a clause in the prayer asking general relief. The facts here are parallel except that the trustee did not call the bankrupt to the stand and asked no costs.

Nevertheless the character of the charge at bar was as equivocal as there; to demand that the respondent should be 'punished' did not tell him that he stood in jeopardy of an unconditional imprisonment. 'Punishment' is a word apt for civil contempts and constantly so used. Thus, if a man be imprisoned for violation of a decree till he complies with it, he would regard himself as 'punished' thought he could get out when he chose. Again, he would think that he was 'punished' if he were fined the expenses of a civil proceeding, as he might be. It does not distort the language of process to say that the trustee might have meant only to put pressure upon the respondent to produce the witnesses named, by locking him up until he did produce them and fining him for the expenses after he had. Again, some part of the relief asked was civil in any event, and the proceeding bore every evidence of being part of the bankruptcy proceedings. Finally, it was prosecuted by the trustee without the initiative of judge or district attorney. In our opinion its criminal aspect was for these reasons not marked clearly enough to support an unconditional sentence of imprisonment. Bradstreet Co. v. Bradstreet's Collection Bureau (C. C. A., 2d Cir.), 249 F. 958; Shulman v. United States (C. C. A., 6th Cir.), 9 Am. B. R. (N. S.) 836, 18 F. (2d) 579; Monroe Body Co. v. Herzog (C. C. A., 6th Cir.), 18 F. (2d) 578; Wakefield v. Housel (C. C. A., 8th Cir.), 1 Am. B. R. (N. S.) 664, 288 F. 712; Mitchell v. Dexter (C. C. A., 1st Cir.), 244 F. 926.

We have ourselves gone further and flatly decided that unless the charge be prosecuted by the district attorney, it cannot be considered as criminal at all. *In re* Kahn (C. C. A., 2d Cir.), 30 Am. B. R. 322, 204 F. 581. That would be conclusive upon us now,

were it not, that in three other circuits it seems to have been assumed that this was not a *sine qua non,* though there was little or nothing said about it in the opinions. Kreplik v. Couch Patents Co. (C. C. A., 1st Cir.), 190 F. 565; *In re* Star Spring Bed Co. (C. C. A., 3d Cir.), 30 Am. B. R. 208, 203 F. 640; *In re* Kaplan Bros. (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 F. 753; Wingert v. Kieffer (C. C. A., 4th Cir.), 12 Am. B. R. (N. S.) 648, 29 F. (2d) 59. Cf. Monroe Body Co. v. Herzog, *supra.* In spite of these decisions there can, however, be no doubt that prosecution by the judge *sua sponte,* or by the district attorney, is an important factor in deciding the issue. In the case at bar it was especially important. An assistant district attorney was present during the hearings, or at least for a part of them, observing, but taking no part. Apparently he wished to keep aloof and merely to learn whether anything would transpire to show that a crime had been committed. His presence without participation was surely misleading if a criminal prosecution was in progress; and while the district attorney did indeed seek to intervene upon this appeal, it was then too late. So far as the doctrine is serviceable at all, it can only be to advise the accused of the nature of the claim; and it serves him not at all after the event.

It is perhaps a misfortune that the result should depend upon the form of the proceeding, and it is quite likely that in fact the bankrupt knew what the consequences to him might be, quite as well as though he had been expressly so told. But whatever the value of the distinction, we must assume that Gompers v. Bucks Stove Co., *supra,* 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 787, 34 L. R. A. (N. S.) 874, is still

> the law, and we must give it its proper effect, so far as we can see. Besides, it is of at least some practical consequence to the respondent in such a proceeding to know whether he is charged with crime; the outcome may be severer, and the degree of proof is higher; his conduct may be governed accordingly. We do not say that this must be known at the outset; it is enough if it becomes manifest in season; but manifest it must be, and not for the first time on appeal. Nor does the requirement involve any hardship to the party who promotes the cause, unless he is really bent upon prosecuting and controlling a criminal proceeding as his own. There is no reason why its character should not be expressly declared at the outset and the initiative of the judge secured, or that of the district attorney. If counsel see fit to leave this feature of the cause *in nubibus* they have themselves to thank for the eventual miscarriage. We will not go through a record, catching at straws, which lead us first one way and then another, and in the end force us to guess about a matter which could be so easily set right at the beginning."

While in the *Guzzardi* case the prayer of the order and petition indicated that the defendants were to be punished, no such prayer occurred here (pp. 18-20).

In *Anargyros v. Anargyros,* 191 Fed. 208 (Cal.), which was a proceeding for violation of a preliminary injunction, the moving papers prayed that respondents be required to show cause why they should not be attached for contempt in the doing of certain acts which were alleged to be in violation of the rights of complainant and the preliminary injunction. The papers were entitled in the

civil suit. Said court, in discussing certain parts of the prayer, said:

> "These averments, while entirely appropriate to a proceding for compensatory relief, are largely unnecessary, if not inappropriate, to one seeking the punishment of a contemnors in vindication of the authority of the court.
>
> On the other hand, if the proceeding is intended as one of a punitive character, the moving papers are wholly insufficient in matters of substance, to advise the respondents of that fact.
>
> A contempt for which one may be punished by fine or imprisonment, purely in vindication of the authority of the court and to sustain the majesty of the law, is in its nature a distinct criminal offense and must in some appropriate form be laid as such.
>
> While the nicety and precision of an indictment may not be required, the pleading or affidavit must not only specify clearly the acts which the contemnor will be called upon to meet, but it must quite as clearly, in some form, advise him that the judgment sought against him is one of a punitory character; otherwise he is to conjecture as to whether it is a proceeding merely to mulct him in damages for the benefit of a moving party, or one to have him punished by fine or imprisonment as for a criminal act. Here, while the specific acts complained of are, I think, stated with sufficient certainty, there is nothing to clearly indicate that the complainant is seeking to have the respondents answer for anything beyond damages for its private benefit. It is alleged that the acts done were in violation of the injunction; but that was essential to either form of relief. It is asked that respondents be 'attached for contempt'; but that

demand is likewise equally appropriate to either character of pleading. Furthermore, there is an entire lack of any prayer, demand, or suggestion that respondents be punished in any manner. While such specific demand is perhaps not essential to enable the court to afford relief of a private and remedial character appropriate to the facts, it is very clearly essential in a proceeding seeking the punishment of a respondent as for a criminal contempt; and especially should this be so where there is an absence of anything else in the pleading to definitely point the nature of the judgment sought. Moreover, as suggested in the Gompers case, it is inappropriate in a criminal contempt to entitle the proceeding in a civil case; that of itself being indicative that the proceeding is merely a part of the main controversy and for a civil and remedial purpose.

A criminal contempt is no part of the main case; it is a proceeding independent and apart, in the nature of a criminal prosecution, and should have a title of its own, proper to indicate its character. As aptly said in that case in speaking of like defects:

'This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge, and not a suit. United States v. Cruikshank, 92 U. S. 542, 559, 23 L. Ed. 588, 593.'

> These defects, therefore, partake of the substance, and render the moving papers insufficient to properly advise the respondents that they were charged with a criminal contempt, and consequently the record affords no sufficient foundation upon which to base a judgment of a punitory nature."

Furthermore, we feel that appellant was entitled to know *whether or not she was in fact in jeopardy.* We have previously pointed out that under the authorities she was entitled to know that the matter was a *charge* and not a *suit.* (The *Gompers* case.) Surely then, when a hearing is in progress, it would not do violence to established authority to let it be clearly known to the accused whether the matter before the court is in the nature of a preliminary hearing or an actual trial. And if it be an actual trial, that the accused will be afforded a full opportunity to defend herself.

Requirements as to form and procedure are founded upon sound reason and the experience of mankind and independently of any technicality of the law, this should be so in cases such as this. None are blind to the fact that the intricacies of the bankruptcy law and the powers of the Federal District Courts are sometimes sought to be used by unscrupulous persons in bludgeoning weak but solvent industrialists into submission to their demands. That such should be is a reflection not upon the courts but upon human nature. What more powerful arm could such designing racketeers have that the charge of contempt of court, skillfully planted, and personally prosecuted, without regard to the forms of law, nor the constitutional

rights of citizens. The district attorney is an officer of the court, sworn to uphold its majesty. He may be expected to be calm and impersonal and not to rush hastily into court without thorough investigation. If, in fact, a crime has been committed, he may be trusted to proceed in an orderly manner in a way which will leave no doubt in the mind of anyone as to the character of the proceeding. The absence of the element of personal greed or vindictiveness should react favorably upon the respect at all times due the proceedings of the federal courts. Our position is that the use of the great power which the federal courts have should be so carefully safeguarded that even the appearance of evil would at all times be scrupulously avoided.

POINT II.

There Was No Jurisdiction to Impose a Large Fine in This Case When No Evidence Was Introduced Even Tending to Show Damages or Injury Suffered by Appellee.

Assignment of error No. XVIII [Tr. p. 155] covers this ground.

This fine, as heretofore pointed out, being made payable to the United States of America in a civil proceeding to which said United States was not a party, was clearly beyond the power of the court. No citation of authority is necessary to establish that a judgment in favor of a third party not a party to the suit is beyond the court's jurisdiction.

Again the record is wholly devoid of any suggestion of proof that any act of appellant had caused any damage. Certainly there is no proof that the United States had suffered damage and none can be inferred. Likewise there is no attempt to prove that appellee suffered damage. Of course, if the matter is civil, then a fine to the United States is unauthorized. As was said in *Dakota Corp. v. Slope Co.* (N. D.), 75 Fed. (2d) 585 (C. C. A. 8):

> "It is true that, in a proper case, a court has power, in a proceeding in contempt, to impose a fine upon the contemnor for the benefit of the party injured. But here we have neither disobedience of a court order nor evidence of damage to the subject-matter."

And in *Judelshon v. Black* 116 Fed. (2d) 166 (C. C. A. 2):

> "The theory of recovery in a civil contempt proceedings is to compel the payment of damages by way of a fine, and, since no damages were suffered, there should be no finding of contempt."

So, while conceding that, had a showing been made of damage actually suffered, a fine, payable to appellee, might have been rightfully imposed, it is our contention that, in the absence of any showing of damage, a fine payable to the United States, in a large sum, is wholly unsupportable in law.

POINT III.

Receiver Not Authorized to Seize Property Adversely Claimed—Burden of Proof.

A.

The argument between the receiver and appellants arose over the question of his authority to take possession of the business and assets of the "Eustace Plumbing Company."

The authority for the appointment of a receiver in bankruptcy procedings comes from the Act and is limited by the Act. The order of the court appointing him cannot be broader than the statute.

> *Boonville etc. Bank v. Blakey,* 107 Fed. 891 (C. C. A. Ind.).

Elsewhere we contend that the moving papers did not authorize an order to appoint a receiver, but irrespective of this, even assuming that this order is valid, we contend the court did not and could not justify or authorize the seizure of the property herein involved, owned by a third party and adversely held and possessed by such third party.

In *In re Kolin,* 134 Fed. (C. C. A. Ill.), 557, the court said as to a receiver:

> "Yet he is not authorized, nor can the bankruptcy court properly direct him to take possession of property held and claimed adversely by third parties." Citing, Boonville etc. Bank v. Blakey, 107 Fed. 891; Bardes v. Hawaidine Bank, 178 U. S. 524, 538.

See also:

> *In re Ward,* 104 Fed. 985;
>
> *In re Kelly,* 91 Fed. 504.

It is appellant's further contention that the said receiver Lynch was exceeding his authority in endeavoring to take possession of said property. Furthermore, we contend that if said order can be interpreted so as to authorize the seizure of such business of a third party, it is of no force or effect and in excess of the court's jurisdiction.

Our assignment of error numbered XII raises this point and reads as follows: "The court erred in finding Katie M. Eustace guilty of criminal contempt and sentencing her when the order appointing the receiver in the above matter did not direct such receiver to take possession of the property concerning which the said Katie M. Eustace is found guilty of contempt."

This order of appointment [pp. 13-15], appointed appellee receiver "of all property of whatsoever nature and wheresoever located, now owned by or in possession of said bankrupt and of all and any property of said bankrupt and in possession of any agent, servant, officer or representative of said bankrupt." It will be noticed that it did not describe any particular property or any particular premises, nor did it authorize him to take possession of the property of any third person or particularly the property of John M. Eustace. The third paragraph of said order [p. 14] provided that all persons, firms and corporations, including said bankrupt, deliver to the receiver all property of whatsoever nature and wheresoever located *"in the possession of them or any of them and owned by said bankrupt"* [pp. 13-14].

The command to this appellant and other third persons [p. 14] is to deliver to the receiver all property in their

possession and control *and owned by said bankrupt* [p. 14]. *Ownership of the property* sought to be taken was an essential matter in determining what the receiver could take possession of and what such third party was authorized to deliver over or the receiver to receive. Union of possession and ownership by the alleged bankrupt was the criterion provided for.

The court said before any witnesses were sworn at the Fourl hearing that the question involved solely depends on the ostensible ownership [p. 50], and would not allow us to show ownership and possession in the husband for some thirty years [p. 51] or the certificate of fictitious name filed and published as required by law [p. 93]. This certificate was read to receiver Lynch [p. 70] and he was advised of such certificate, and appellants both notified him of the ownership and possession of John M. Eustace.

We believe the rule applicable here is as follows:

> "Third parties having at the time of the bankruptcy possession of the tangible property or funds involved, under claim of a beneficial or adverse interest therein, cannot be obliged to surrender them, nor can third parties owing debts to the bankrupt at the time of the bankruptcy, be obliged to pay the debts, nor can such parties be obliged to submit their rights in such property, funds or debts for determination to the bankruptcy court, by summary proceedings in the bankruptcy proceedings, even on notice and hearing: Such property, funds or debts thus owed or adversely held, are to be reached only by instituting plenary suits, in which the parties may be brought into court

by due service of summons or subpoena, pleadings may be filed, issues joined and trial had, in accordance with the usual forms of procedure."

Remington on Bankruptcy, Sec. 2134;

In re Teschmacher & Mrazay, 11 A. B. R. 549, 127 Fed. 728 (D. C. Pa.);

Bardes v. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, 4 A. B. R. 163;

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, 8 A. B. R. 224;

Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293, 7 A. B. R. 421;

Jacquit v. Rowley, 188 U. S. 620, 47 L. ed. 620, 23 Sup. Ct. Rep. 369, 9 A. B. R. 525.

We feel that we are entitled to rely on a recent decision of this circuit as sustaining our position. We quote from *Oswald v. United States,* 71 Fed. (2d) 255 (June, 1934):

"On Sept. 9, 1933, one Marion Newman was, on an *ex parte* motion, appointed receiver for a corporation known as Southern California Kennel Club, Inc. The order appointing the receiver authorized him to take possession of all the property of said corporation. On the night of September 9, 1933, the receiver Newman, with a United States Marshal and an attorney went to the dog racing track, called the Southern California Kennel Club where dogs were being raced. The Marshal went for the purpose of serving a copy of the order appointing the receiver on an officer of said corporation. After arriving at the dog track, one of the employees at the track let

> Newman, his attorney and the Marshal in a room where approximately $8,500 in cash was lying on tables. The Marshal served George H. Oswald, president of the corporation, Southern California Kennel Club, Inc., with a copy of the order appointing Newman receiver. The defendants were informed Newman was receiver of said corporation, at which time, Newman, as receiver of said corporation, requested possession of the $8,500 and also the dog track and the equipment. Geo. H. Oswald told Newman, the receiver, that there were no assets belonging to the corporation. Thereafter the said Oswald and the other defendants 'with force and violence' expelled the said receiver from the premises."

Thereafter, criminal contempt proceedings were filed against the defendants, they were tried before the Honorable George Cosgrave, convicted and an appeal allowed.

Throughout the progress of the case the appellants insisted that the Southern California Kennel Club, Inc., owned no property that was in their possession, and demanded by appropriate motions and objections that the government indicate what property it was claimed they had refused to turn over to the receiver and what property was owned by the corporation.

The government made no proof whatever that the corporation owned the dog race track or the money in the defendants' possession. The defendants claimed that the money and property belonged to defendant Nick Oswald.

This court reversed the conviction on the ground that there was no evidence to support the conclusion that the corporation owned anything at the place where the alleged contempt occurred. The court said:

"The government did not sustain the burden of proof and the defendants affirmatively established that there was nothing in their possession which the order required to be delivered to the receiver. Even if the trial court discredited the testimony of the defendants tending to affirmatively establish their ownership of the property, there was no evidence to establish ownership of the property by the corporation, hence there was no contempt in refusing to deliver the property demanded because the order of the court accompanying the demand showed that the demand was unauthorized. * * * We must assume that the property demanded was not covered by the order, that the receiver had no right to go upon the property or to remain there against the wishes of the lawful owner and that the refusal to turn over the property and expulsion of the receiver was proper if no unnecessary force was used * * *

"The order of the court appointing the receiver directed him to take charge of all property belonging to the corporation. He had no authority to demand possession of property that did not in fact belong to the corporation. Neither did the order require the appellants to turn over property that belonged to them. If the property demanded had been identified in the order other than by its ownership, the situation would have been different." (Italics ours.)

It needs but little demonstration to show that the foregoing case is on all fours with the case at bar. In that case the receiver was appointed *ex parte* by the Honorable George Cosgrave. The same is true here. The order appointing the receiver authorized him to take possession

of ALL the property of the corporation but did not contain specific reference to ANY property. The same is true in the case at bar. The receiver there went to the place where he believed the corporation was carrying on business, secured admission through an employee, served the order and demanded possession of the business. The same was done in the case at bar. The parties served, one of whom was the president of the corporation for which a receiver had been appointed *ex parte,* claimed title, ownership and the right of possession of the business which the receiver demanded as against the corporation and receiver. The same is true in this case. The receiver in the *Oswald* case was expelled from the premises with force and violence. In our case the receiver was expelled but without force or violence.

There can be no doubt as to there being an adverse claimant in possession.

The appellant, Chas. W. Fourl, represented John M. Eustace, the adverse claimant, and was authorized to do whatever was necessary to protect his rights [p. 97]. This evidence is uncontradicted. The evidence shows [p. 99] that appellant Fourl informed the receiver of the filed certificate of fictitious name of the "Eustace Plumbing Company" in the name of John M. Eustace and that said individual had been in such business for thirty-five years. The receiver's representative at the other store read to the receiver the said certificate of fictitious name [p. 99]. The appellant Fourl at closing time said to the receiver Lynch: "Now you can't remain here, Mr. Lynch. This is the place of business of John M. Eustace and the court never authorized you or anybody else to take possession of property other than the property of the alleged bank-

rupt in the case, Katie M. Eustace" [p. 99]. The receiver said that if Fourl would place his hand on him, he (the receiver) would accompany him out. This was done, and the receiver and all parties departed [p. 100].

It was therefore evident that the property was adversely claimed by John M. Eustace and was in his possession, and that the said Katie M. Eustace made no claim of title or ownership in the property sought to be taken by the receiver and had no possession thereof. Since no particular property was described in the order other than by reference to the *ownership* by Katie M. Eustice, the receiver was not authorized to take possession of the property involved herein, claimed by John M. Eustace. The receiver was a trespasser and, as decided in the *Oswald* case, the appellant Fourl was justified in ordering the receiver from the premises.

There was no intent to defy the order of the court, but only a refusal to allow appellee to take charge of the property of John M. Eustace, which was not required under the terms of the said order.

B. Burden of Proof.

The decision of the Circuit Court in the *Oswald* case is based largely on the total failure of the government to sustain the burden of proving that the property in question did in fact belong to the "corporation."

We feel that there has been a like failure in the case at bar on the part of appellee to sustain a like burden of proof and that for that reason, among others, the conviction must be reversed because not only is there a total failure to show any ownership in Katie M. Eustace, but

the petition for the order to show cause in re contempt [p. 16] does not even allege any ownership by Katie M. Eustace of the business or even that she was in possession thereof. There is a lack of both allegation and proof. Proof of possession by the alleged bankrupt was sought to be shown by a conversation between the receiver and a workman whom the receiver found on the premises alone at the time he came to the shop. Hearsay statements of Stevenson, a workman, as to possession or ownership are not only not admissible but they are not proof of the fact itself.

While such hearsay statements of Stevenson were testified to in the *Eustace* case, over objection [p. 41], and not being evidence, the case is in the same condition as if such statements had never been made. There is no evidence in the case to support the proposition that the alleged bankrupt was in possession or owned the Eustace Plumbing Company.

The receiver said he knew nothing of the capacity in which Stevenson was acting there, or was employed there, other than what he told him [p. 67]. This made it clear that the receiver's testimony as to his conversation with Stevenson was not proof of such fact.

As to appellant Fourl, the said Stevenson never testified at all. Hence the only testimony as to this possession or ownership by any one is that of the receiver. This testimony covered only the conversation heretofore referred to with said Stevenson. This being merely hearsay, and not being admissible against appellant Fourl, there is no showing of any character whereby to bind said Fourl with any statements of Stevenson and the cause

stands as to him without a vestige of testimony as to possession or ownership by Katie M. Eustace.

In view of the court's ruling in *In re McIntosh,* 73 Fed. (2d) 908, and the *Oswald* case, heretofore referred to, that the burden of proving guilt beyond a reasonable doubt in a criminal contempt case lies with the prosecution, (see also *U. S. v. Jose,* 951, 954 C. C. A. Wash.), and this includes a criminal intent upon the part of defendants. We respectfully submit that the burden of proof was not sustained, particularly as to the criminal intent and appellants are entitled to a reversal.

POINT IV.

The Proceedings Were Fatally Defective Because the Pleadings Did Not State Jurisdictional Facts; the Order Based Thereon Is Void and Unenforcible.

We here note assignments of error numbered I and XII which read: (I) The court erred in overruling the motion of Katie M. Eustace to dismiss the petition and order to show cause in re contempt and restoration of possession [p. 140].

(IX) The court erred in finding Katie M. Eustace guilty of contempt and in adjudging her guilty of contempt on proceedings founded upon an affidavit and an order to show cause which contains an insfficiency of statement of facts to justify a proceeding in contempt.

Not only is the petition in re contempt and the order to show cause fatally defective and wanting in essential averments, but the involuntary petition itself is fatally defective. We will take up each pleading separately.

A. The Involuntary Petition Is Fatally Defective.

The involuntary petition in this cause [Tr. pp. 6-8] is fatally defective because it does not state a cause within the bankruptcy act. It does not allege insolvency when the judgments referred to in paragraphs 2 and 3 were procured. It does recite that "while insolvent," the bankrupt suffered and permitted the Oil Tool Exchange, Inc., to obtain through legal proceedings a judgment lien on real estate belonging to and standing in the name of the alleged bankrupt." Petitioner covered the words of the statute, but it is too well settled to need citation of authority that an allegation of insolvency is not an allegation of fact. The petition must allege the debts and amount of assets in order to show insolvency. Otherwise the allegation is a mere conclusion. In this case it is even worse than a mere conclusion. Moreover, it does not state against whom the judgment was recovered. As to the second act of bankruptcy [p. 8] the petition does not show that Fourl or Harris (to whom the transfers were alleged to have been made), were creditors of said alleged bankrupt, nor does it allege there was an intent to prefer such creditor or creditors over other creditors as required by the bankruptcy act. As to the third act of bankruptcy alleged [p. 8], the allegation is that the alleged bankrupt while insolvent, caused to be transferred and concealed in the name of one G. Dibetta certain real estate situated at Huntington Beach, Cal. There is an entire absence of any allegation whose real estate this was. It is not alleged it was her real estate. It might just as consistently be the real estate of some other person as real estate belonging to the alleged bankrupt. She may

for all intents and purposes have been representing some one else when said transaction occurred.

In *In re Sig. H. Roselblatt & Co.,* 193 Fed. 638 (C. C. A.), it was held that:

A general averment in an involuntary petition in bankruptcy that the alleged bankrupt within four months preceding the date of the filing of the petition committed an act of bankruptcy, in that, while insolvent, he transferred a part of this property to creditors with intent to prefer them, and transferred and concealed large sums of money and available securities, with intent to defraud his creditors, and that the concealment was a continuous one, is too vague, and the petition is properly dismissed on demurrer.

To the same effect is

In re Carasaljo Hotel Co., 8 Fed. (2d) 469;

Matter of Moscovitz, Bankrupt, A. B. R. (N. S.) 6, 163.

It thus appears that there is no act of bankruptcy alleged. The petition is fatally defective and does not warrant the granting of any relief. We have collected under the following sub-heading numerous authorities on the subject of pleading which are applicable to both subpoints.

B. The Petition Seeking Appointment of Receiver is Fatally Defective.

Both the Bankruptcy Act, subd. 3, section 2, and the cases hold that: A receiver can only be appointed when

facts are stated showing that the appointment is absolutely necessary for the preservation of the estate.

Bankruptcy Act, subd. 3, sec. 2;

Bryan v. Bernheimer, 18 U. S. 188;

Faulk v. Steiner, 165 Fed. 861;

In re Oakland Lumber Company, 174 Fed. 634.

And is limited by the act itself.

Boonville Natl. Bk. v. Blakey, 107 Fed. 891 (C. C. A. Ind.).

In *In re Hargadine-McKittrick Dry Goods Co.,* 239 Fed. 160, the court said:

> "Where the appointment of a receiver in bankruptcy is sought, it is not enough to allege the necessity for the appointment in the language of the statute, but *the moving papers must set forth the specific facts which reasonably establish such necessity.*" (Italics ours.)

In *Faulk v. Steiner,* 165 Fed. 861, the court said with respect to receivers in bankruptcy as follows:

> "The authority to make the appointment is conferred and limited by the act. There is but one ground stated for the appointment. The act authorizes the appointment of receivers 'upon the application of parties in interest in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.' *The petition to appoint the receiver should allege that the appointment is absolutely necessary for the preservation of the estate,*

> *and the facts should be stated, either in the sworn petition or in accompanying affidavits showing the necessity.*" (Italics ours.)

A petition much stronger than the one at bar was considered and held to be insufficient in that case. It is to be noted that the appointment in the case at bar was on the petition alone, without any accompanying affidavit—without any proof of facts [p. 13].

Again, the Second Circuit Court of Appeals in *In re Oakland Lumber Company,* 174 Fed. 634, said:

> "The power to take from a man his property is both arbitrary and drastic and should not be exercised except in the clearest cases. Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is absolutely necessary —after the filing of the petition and until it is dismissed or the trustee qualified—but fraud cannot be presumed * * * In no case should a remedy so far reaching in its effects be resorted to except upon clear and convincing proof * * * All these reasons combine in requiring that the power to appoint receivers should be exercised, not as a matter of course, but cautiously, circumspectly and always upon proof that the appointment is 'absolutely necessary.' The court has *jurisdiction under the statute to appoint receivers only when the papers on the application make a clear case.*" (Italics ours.)

Especially is this true when the application is without notice to the bankrupt. Under the well established rules a chancellor will not appoint a receiver without notice except in a case of imperious necessity, when the rights of the petitioner can be secured and protected in no other way.

As said in *Faulk v. Steiner,* 165 Fed. 861 (C. C. A. Ala.), *ibid:*

> "No principle is more essential to the administration of justice, whether by referee or a judge, than that no man should be deprived of his property without notice and opportunity to make his defense. A mistaken notion seems to have grown up in reference to bankruptcy proceedings that they are an exception to this principle."

The petition in that case was found defective because it did not state facts sufficient to authorize the appointment of a receiver without notice in an involuntary proceeding upon the petition alone. Allegations of the necessity, such as absconding, absence of bankrupt beyond jurisdiction, or imminent danger of irreparable injury, were held to be jurisdictional where a receiver is appointed without notice before adjudication.

The order of appointment herein [p. 13] recites it is made on *verified petition* duly filed, and it satisfactorily appearing *therefrom* that it is absolutely necessary, etc., to appoint a receiver. This, it will be noted, does not connote a finding of fact but merely recites the facts upon which the court determined the absolute necessity. The words of the act are not merely *necessity,* but *absolute* necessity. Does the petition allege such absolute necessity, as required by the act?

The necessity herein is alleged to arise for the following reasons:

(1) That said bankrupt plans and intends to dispose of and conceal a stock of plumbing supplies so as to avoid her creditors from securing the benefit of the same as

assets of the estate; (2) that she has from some time been concealing in the names of dummies *other* real and personal property [p. 11]; that the value of her business and property is about $10,000.00 [p. 11].

Are the foregoing allegations of facts?

The allegation is "that Katie M. Eustace *has for a long time past been* engaged in the plumbing business." It is not alleged that she *is now* so engaged. It is alleged "that said alleged bankrupt *has been* the manager and operator of said business." It is not alleged that she *is now* such manager and operator. It is alleged that "said bankrupt plans and intends to dispose of and conceal such stock of plumbing supplies," etc. This is clearly nothing but the conclusion of the pleader, for no person can allege with certainty what anyone plans and intends to do. No facts are alleged from which such a conclusion might be drawn. It is alleged that "said bankrupt * * * has for some time past been concealing in the names of dummies other real and personal property."

This is not a statement of fact, it is a conclusion only. Not a single transfer to any person is alleged. Moreover, it is an immaterial averment and does not show necessity, for if the alleged bankrupt has sufficient other property to pay her debts, her purpose in doing so is immaterial.

There is no allegation that she did not have sufficient property to satisfy her creditors otherwise than that so transferred. When we read the petition for the appointment of the receiver in connection with the allegations of the involuntary petition, as we must, the total failure of jurisdictional facts most strongly appears. The involuntary petition shows three claims only, as follows [p. 7]:

Oil Tool Exchange, Inc.	$6284.02
Speirs & Meadows	650.00
A. M. Kupfer	49.95

This represents a total of $6983.97 in claims. The petition on which the receiver was appointed alleged the value of the business and property to be the sum of $10,000.00 [p. 11]. Thus the petition on its face shows the alleged bankrupt solvent with an excess of assets over liabilities. This is especially pertinent in view of the lack of allegations of insolvency or the existence of other creditors.

We submit that there is nothing in the entire petition which could authorize or justify a court in exercising the most extraordinary power of appointing a receiver, especially *ex parte,* without notice.

In this case we find a creditor having a claim less than fifty dollars, on a five hundred dollar bond, taking possession of a going business with assets as the petition alleges [p. 15] of ten thousand dollars without notice to the bankrupt or any other person, and taking as we claim, a business of a third party, the bankrupt's husband, which he had conducted for some years.

Since the petition for the appointment does not show the *absolute necessity* required by the statute, and the order itself showing it was made on said petition alone, the record falls short *both in averment and proof* of showing the necessity required. Neither the petition, the order of appointment nor any other part of the record show that the appointment was absolutely necessary for the preservation of the estate, and especially without any notice.

Since both the involuntary petition and the petition for appointment of receiver are fatally defective in their jurisdictional facts, the *order of appointment is void* and of no force or effect and the appellant cannot be held in contempt of court.

C. The Order to Show Cause in Re Contempt Was Likewise Fatally Defective. [Tr. p. 20.]

The acts complained of were not done in the immediate view of the court. It was therefore a constructive contempt, if anything. Ordinarily an affidavit of facts constituting the contempt must be presented to the court, which affidavit must show on its face a case of contempt, and if it does not the court has no jurisdiction and the order of contempt is void.

Overend v. Sup. Ct., 131 Cal. 280, 284;
Frowley v. Sup. Ct., 158 Cal. 220;
Fletcher v. Dist. Ct. Appeal, 191 Cal. 711.

Such affidavit must show a criminal intent and in the absence of such allegation is fatally defective and subsequent proceedings are absolutely void.

Hutton v. Sup. Ct., 147 Cal. 156.

In this case there was no affidavit of facts or moving papers serving as such. These proceedings were instituted by a petition of the receiver seeking to recover possession of said business, for an injunction to restrain interference with his possession and to declare defendants to be in contempt. The fatal condition of this pleading has already been shown.

There was no affidavit or moving papers in this case other than an order to show cause [p. 20]. This defect is

jurisdictional. If the papers fail to contain facts constituting contempt the defect is jurisdictional.

Berger v. Sup. Ct., 175 Cal. 719, 15 A. L. R. 373;

Strain v. Superior Court, 168 Cal. 216, Ann. Case, 1915 D. 702;

Phillips Sheet, etc. Co. v. Amalgamated, etc. Workers, 208 Fed. 335.

Such defects cannot be cured by proof on the hearing.

Frowley v. Superior Court, 158 Cal. 220.

The order to show cause in re contempt against appellants while directed to Katie M. Eustace and Chas. W. Fourl [p. 20] *and service of which was shortened to one day* [p. 20] *does not show any facts whatever.* There was no order to serve the *petition* for the order [p. 16] on the respondents, nor does the record show such service [p. 16]. As a proceeding in a civil cause to require restoration of possession of the premises and an application for an order restraining interference therewith, this might be considered sufficient. But as a criminal or quasi-criminal proceeding in which it is sought to punish respondents by fine or imprisonment, another condition exists.

As a criminal proceeding the respondents are entitled to know what they will be compelled to meet. There must be both allegation and proof of the facts constituting the charge complained of.

Anargyros v. Anargyros, 191 Fed. 208, 210;

Sone v. Aluminum Castings Co., 214 Fed. 936, 131 C. C. A. 232;

Frowley v. Superior Court, 158 Cal. 220, 110 Pac. 817.

and in such form that the accused may know that the judgment sought against him is one of a punitory character,—that it is intended to punish him by fine or imprisonment.

Anargyros v. Anargyros, 191 Fed. 208.

The California cases are to the same effect:

"An affidavit on which constructive contempt proceedings are based *must show on its face* the acts constituting the contempt, since the affidavit constitutes the complaint, and, unless it states facts showing that a contempt has been committed, the court is *without jurisdiction* to proceed, and any judgment based thereon is void."

Frowley v. Superior Court, 158 Cal. 220, 110 P. 817;

Mitchell v. Superior Court, 163 Cal. 423, 125 P. 1061;

Strain v. Superior Ct., 168 Cal. 216, 142 Pac. 62; Ann Cas. 1915D 702.

"Proceedings in contempt being of a criminal nature, no intendments or presumptions are indulged

Frawley v. Superior Court, 158 Cal. 220.

These decisions are all in harmony with the decisions of this court. As said in *Beauchamp v. U. S.,* 76 Fed. (2d) 663, 668, C. C. A. 9th:

"In order that disobedience of this injunction order may constitute contempt, it is necessary that

> the order be valid. Disobedience of a void mandate, order, judgment or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt."
>
> When '* * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt, is equally void * * *' Ex parte Fish, 113 U. S. 713, 5 S. Ct. 724, 726; 28 L. Ed. 1117; Ex parte Terry, 128 U. S. 289, 95 S. Ct. 77, 32 L. Ed. 405; In re Ayres, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216."

In *Ex Parte Clark,* 126 Cal. 235, it was held no court or judge had power to punish as a contempt the violation or disregard of an unlawful order; and, where the court had made an unlawful order requiring the secretary of a corporation defendant to produce all of its books, in the absence of any showing that they contained evidence material to the plaintiff's cause, and where the secretary as a witness for the plaintiff had testified to the contrary, an order imprisoning him for contempt for violation of such unlawful order is void, and he is entitled to be released upon habeas corpus.

In *State ex rel. Thornton-Thomas Mercantile Co., et al. v. Second Judicial District Court of Silver Bow County, et al.,* 20 Mont. 284, 50 Pac. 852, an order appointing a receiver was held to be void because the complaint failed to state facts sufficient to constitute a cause of action.

The same complaint and the same order appointing a receiver came before the same court in *State ex rel Johnson v. Second Judicial Court, etc.,* 21 Mont. 155, 53 Pac. 272, 69 Am. S. R. 645, in proceedings to punish a stranger to the original proceedings for contempt for failure to obey an order of the court made in the original proceedings that the stranger turn over certain money to the receiver. The court there held:

> "Where a stranger to all parties to the original suit refused to turn over property to the receiver appointed in such suit and disobeys an order of court to turn over which the court had no authority in law to make, HE CANNOT BE GUILTY OF CONTEMPT."

See also:

State v. Burke, 163 Ill. 334, 45 N. E. 235;
People v. Weigley, 155 Ill. 491, 40 N. E. 300;
Leopold v. People, 140 Ill. 553, 30 N. E. 348;
Brown v. Moore, 61 Cal. 432;
People v. O'Neil, 47 Cal. 109;
Whitley v. Bank (Miss.), 15 South 33;
State v. Winder (Wash.), 44 Pac. 125.

If the order is void there can be no question.

In *Anderson v. Robinson,* 63 Ore. 228, 126 Pac. 988, a receiver was appointed ex parte without notice. There was no statute requiring notice but the Supreme Court held the appointment void because, when such appointment was made, *there was no proof of facts* before the

court. The court further held such defect jurisdictional. The court there said:

> *"If the court is without jurisdiction to appoint a receiver, the order is void, and may be attacked or disregarded."*

As pointed out heretofore the receivership order could not authorize the receiver to take possession of the property of third persons claiming adversely under a bona fide claim of ownership as in this case. As said in *Bardes v. Hawaiideen Bank,* 178 U. S. 524, 538:

> "The powers conferred on the courts of bankruptcy by clause 2, sec. 67, after the filing of the petition in bankruptcy in case it is necessary for the preservation of property of the bankrupt, *can hardly be considered as authorizing the forcible seizure of such property in the hands of an adverse claimant."*

We feel that it should be readily apparent that the order appointing appellee a receiver was unlawful and void. Under the above authorities the court had no jurisdiction to appoint him ex parte on the basis of an involuntary petition in bankruptcy and a petition for appointment of receiver, both of which failed to state any jurisdictional facts where the order was granted on the petition alone without any showing of facts which could justify such appointment. Since the order was unlawful and void, there was no contempt in resisting its unwarranted enforcement.

POINT V.

A. Errors in Admission of Testimony.

The first hearsay declaration we wish to direct the court's attention to occurs on page 52 of the transcript wherein the receiver Lynch testifies over objection and exception taken [Exception 4, p. 53] as to a conversation with a workman Stevenson at the place of business of the Eustace Plumbing Company, and gives the content of this testimony [pp. 52-54]. Said Lynch testified that said Stevenson was working on a grinding machine, and he asked him who was in charge, to which Stevenson replied: "I am the only one here so I guess I am in charge," and in reply to a question as to where Mrs. Eustace was, he said she usually arrived around 10 a. m. and that he said he had not seen Mr. Eustace for more than a year and in reply to a question as to who was the owner said, "well as far as I know Mrs. Eustace was."

On cross-examination said Lynch testified [p. 67]:

> "I knew nothing about the capacity in which Mr. Stevenson was acting there or was employed there other than what he told me. He was the only person there."

It is therefore, evident that this testimony was hearsay and should not have been admitted. Not only was it merely the recital of a conversation, which is not proof of the facts testified to, but the conversation not being with respect to a transaction then depending *et dum fervet opus,* and with a workman whom it was not shown was representing either appellant, was inadmissible against either party; especially against appellant Fourl. More-

over, a workman could not be presumed to make any statement or conclusion which could be binding on either appellant.

Admissions or statements of a witness not made within the scope of his employment and not made in regard to a transaction then depending *et dum fervet opus* were inadmissible.

> *Fidelity & Casualty Co. v. Haines,* 111 Fed. 337;
> *Goddard v. Freficld Mills,* 75 Fed. 818.

This evidence is extremely important and undue emphasis was placed thereon by the court. Thus, while the witness Lynch was being cross-examined by appellant Fourl's attorney upon matters he contended showed there was no basis whatever for the claim that Katie M. Eustace was in possession of the property, the court made this statement [Tr. p. 64]:

> "Now the man inside said that he was employed by her, acting under her instructions."

The man inside was of course Stevenson.

Exceptions Nos. 4 and 5 was allowed to the admission of this testimony [p. 54]. There was no showing he was an employee, or agent of appellant Fourl, or anything else. Even an employee working on a piece of machinery cannot be said to be in possession and control of the business there conducted, nor the property there situated. Otherwise every employee of every store or factory, in the absence of the real owners, might be claimed to be in possession or control of the business of the owner. Such a position is preposterous.

The conversation between the Receiver Lynch and the said Stevenson in the absence of the defendants, heretofore referred to, could not bind the defendants or either of them, and was inadmissible, and is the only evidence upon which the court found possession in defendant Katie M. Eustace. Indeed, Stevenson's testimony [pp. 40-41] was introduced in the trial of the contempt proceeding of Katie M. Eustace, which was held a week or so prior to the hearing of the order to show cause against Fourl. In fact the court [p. 64] at the outset when the first witness against said Chas. W. Fourl was being examined, made a resumè of the testimony of one Stevenson, who testified at the *previous hearing* of Katie M. Eustace to the effect that the man inside said that he was employed by said Katie M. Eustace and acting under her instructions [p. 64]. The court even stated he was making a statement of evidence developed at the *previous hearing,* at which said Chas. W. Fourl was not represented, as the court well knew [p. 65]. Exception No. IX covers this. Yet we find the order on contempt as to Chas. W. Fourl [p. 130] reciting the evidence of Stevenson, who was never sworn or testified as a witness in the contempt hearing of Chas W. Fourl [pp. 46-120]. The court found said Katie M. Eustace [p. 130] to be in possession at the time the receiver came there although she was not there, upon said hearsay testimony and upon testimony never produced in the Fourl hearing. This recital [pp. 129-133] of these hearsay statements shows the error was material and prejudicial and affected the court in arriving at its judgment.

Again the court allowed one Geo. Dyer to relate certain conversations with one John Eustace, Jr. [pp. 86-87],

concerning contents of the books of the Eustace Plumbing Company, kept by one Griffith, whether an account was kept for John M. Eustace, over objection that the admissions or statements of an agent are not competent evidence except when made within the scope of his employment during the performance of his duty [p. 86]. Neither John Eustace, Jr., nor Griffith were employees of appellant Fourl or appellant Katie M. Eustace. No foundation was made to show this. It was hearsay and the books themselves were the best evidence. [Exception No. XVIII, p. 87.]

B. Errors in Rejection of Evidence.

This point is more fully stated by quoting assignments of error numbered XI and XIX [p. 142] reads as follows:

> "The court erred in the admission and rejection of evidence in this that the court rejected the proofs offered by Chas. W. Fourl with respect to the marital status of the alleged bankrupt and with respect to the ownership of the property concerning which these proceedings were instituted."

Assignment numbered XIX is a somewhat more detailed statement of the thought:

> "The court erred in sustaining objection to appellant's offer to prove that the plumbing business, concerning which the alleged contempt was committed, had been owned and operated by John M. Eustace, husband of Katie M. Eustace, prior to their marriage in 1904 and continuously ever since, and that

she merely assisted him in it and had never put any money in it or acquired any right in it except a community interest; that Katie M. Eustace was never a sole trader nor qualified or licensed as a Master plumber, and that the license for conducting the plumbing business at 1246 East Ninth Street was and is held by John M. Eustace."

Appellant offered to prove by various witnesses [pp. 90-92] that the defendant Katie M. Eustace is and since 1904 has been the wife of John M. Eustace, and that said John M. Eustace before and ever since his marriage owned and conducted the business known as the Eustace Plumbing Company, and that the defendant at no time had any interest in the said business; that said wife had no certificate of qualification as a master plumber, which was prerequisite to engaging in such business under the city ordinance of Los Angeles where the business was conducted; that a certificate of fictitious name had been filed by said John M. Eustace to the effect that he was doing business as the Eustace Plumbing Company; and that Katie M. Eustace had never taken any proceedings as required by sections 1811-12, C. C. P., of the state of California to enable her as a married woman to become sole trader [p. 90].

The witnesses were not examined by question because the court excused us from doing this [p. 92]. This testimony was rejected on the ground of immateriality and irrelevancy [p. 92] and this we feel was prejudicial error affecting one of the vital questions involved in this case.

The court indicated he was not interested in ownership of the property involved, only in possession [p. 92].

When the order of appointment of the receiver was made by the court, which is the measure of authority of said receiver [p. 14], it required all persons, including the bankrupt, to deliver to and turn over to such receiver all property *"in the possesion of them or any of them, and owned by said bankrupt and such bankrupt is ordered forthwith to deliver to said receiver all and any such property now in the possession of said bankrupt."* [p. 14.]

It will be noticed that *possession plus ownership* by the bankrupt was the factor determining whether the receiver was to take possession of the property. Even the bankrupt was only required to turn *such* property over to the receiver. Property the bankrupt did not own was not required to be delivered over to the receiver.

This proffered evidence tended to show who was in possession of the premises at the time of the alleged receivership. It was one of the physical facts to be considered in connection with the business. The receiver [p. 52] had testified, over objection, to conversations he had with one Stevenson, a workman, in the absence of appellants as to whether Mrs. Eustace was the owner of the business and the reply of the workman: "well, as far as I know Mrs. Eustace is the owner." [pp. 41, 53.] On cross-examination Stevenson said he did not know of his own knowledge who owned the business, and that if said receiver had asked him if John M. Eustace owned the business he would have said yes as far as he knew [p. 41].

Yet, while admitting such testimony as to ownership, over objection, when presented by the receiver, the court refused to admit evidence documentary and verbal of

ownership to overcome such statement of Stevenson. The receiver regarded these questions to Stevenson as important, for we find this statement on page 67 of the transcript: "I was inquiring for Mrs. Eustace because I wanted to find out who was in possession, in control."

Certainly the facts offered to be proved, to-wit, ownership by John M. Eustace of the business, filing of certificate of fictitious name by him as Eustace Plumbing Company, relationship of alleged bankrupt as wife of John M. Eustace, inability under law for her to engage in plumbing business because of city ordinance requiring master plumber's certificate of qualification, and her inability to engage in business by reason of not having become a sole trader under the state law, all tended to negative the hearsay declarations of Stevenson, a workman, made in the absence of appellants, and tended to negative ownership and possession in the alleged bankrupt and place it in that of John M. Eustace.

Furthermore, since under the law heretofore cited, the receiver was not and could not be authorized to or empowered to, take possession of the property of third persons in their possession and adversely claimed, it was proper to show that John M. Eustace was the owner of the business and in possession thereof, and not his wife, the alleged bankrupt.

It was admissible for another reason, for under the *Oswald* case, 71 Fed. (2d) 255, heretofore set forth in this brief, appellant was not required to deliver to the receiver property claimed by his client.

Exception No. 17 [p. 80] and Exception No. 19 [p. 93] are directed to the same question. The court would

not allow argument on the subject [p. 80] and would not allow appellant to show conduct of the business by John M. Eustace for more than thirty years [p. 90], all tending to show possession and ownership.

In view of the foregoing and the court's attitude, as pointed out in the references above, this was vital testimony, affecting the substantial merits of the case and its rejection was prejudicial and could not help but affect the decision.

We need only refer to the orders in re contempt [pp. 129-131] and [p. 129] finding appellants guilty and giving certain relief. These findings are in the nature of findings of fact and conclusions of law but are really a resumè of the evidence. On page 130 of the transcript we find a resumè of the conversation of Stevenson and the receiver, as well as the hearsay statements heretofore objected to. The court evidently based his decision thereon, as there is no other testimony even tending to support a possession or ownership by the alleged bankrupt. This order is dated and entered after the perfecting of the appeal as heretofore pointed out and entered *nunc pro tunc,* but if this is not a civil case such a finding of fact and conclusion of law has no place in the record. If a civil case, it was entered after appeal perfected, when the court's power over the case had ceased and is of no force or effect. However, it does show what the court had in mind when it made the rulings complained of. It shows clearly it was a vital factor in the decision.

Again it was prejudicial error to refuse the admission of testimony that the receiver had notice of the ownership by John M. Eustace of the business conducted under the name of Eustace Plumbing Company and that Katie

M. Eustace had no interest therein [Exception No. 8, p. 60].

An offer was made to show that one Hiram E. Casey told the receiver before said receiver went to the place of business of the Eustace Plumbing Company that the alleged bankrupt had no interest therein and that same was not in the possession of the bankrupt [p. 60].

This is covered by assignment of error No. 21 [p. 144].

The reason the court gives is as follows:

> "The Court: Mr. Tuttle, the court expresses the opinion that if a Receiver or an officer of the Court were to be guided or affected by what counsel told him as to the facts in cases he would never get anywhere. I think that is evident to anybody. That fact would mean nothing at all. The objection is sustained. The ruling has already been made, however."

We submit this was error as in connection with the other testimony as to possession and ownership excluded, it tended to show who was in possession. This being a vital question under the court's view it should have been received and its rejection was prejudicial error.

While the court may deem the rejection of any one of them was not sufficient to authorize a reversal, yet when considered in connection with the manner in which the case was conducted it indicates that the appellants did not have that fair and impartial trial to which they were entitled.

POINT VI.

The Proceedings Below Denied Appellant the Due Process of Law Guaranteed by the Constitution.

As we pointed out in our statement of facts, appellant was called as a witness against herself on the day the matter first came before the District Court. She was neither informed that the proceedings were criminal; that she was in jeopardy; nor advised of her right to refuse to incriminate herself. The whole proceeding at that stage was treated as purely civil—a means of forcing a quick turnover. Nothing appeared from the moving papers and nothing was said or done to indicate to appellant that if she handed over her key to the premises in dispute anything further would be done or required of her. The attitude of the court at that time indicated that if there was any further interference with the receiver, the court would be inclined to be severe about it (22) but certainly nothing suggested that the matter which had passed would be treated as criminal and a severe sentence imposed. So that appellant is hardly to be blamed for omitting to insist that she should not be called to testify. We are not to be understood as conceding that anything appellant testified to did in fact incriminate her—our point is rather, that it was a violation of her constitutional rights to call her as a witness without informing her of her right to refuse to testify—IF THE PROCEEDING WAS IN FACT CRIMINAL. The Supreme Court of the United States in its decision of the *Gompers* case noted this constitutional right when it said:

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable

doubt, and cannot be compelled to testify against himself." Citing Boyd v. U. S., 116 U. S. 616; United States v. Jose, 63 Fed. Rep. 951; State v. Davis, 50 W. Va. 100; King v. Ohio Ry., 7 Biss. 529; Sabin v. Fogarty, 70 Fed. Rep. 482, 483; Drakeford v. Adams, 98 Georgia 724.

The action of the trial court in allowing appellant to be called as a witness against herself was assigned as error in the assignment numbered XIX. [155.]

We are not unmindful of the authorities which hold that this constitutional guarantee against self-incrimination is a personal privilege whch may be waived, but we most strenuously contend that such waiver, under the authorities, must be voluntary and not induced by trick, device, or coercion.

How, then may it be said that there was a voluntary waiver in this case when *nothing* about the pleadings, order, or conduct of the case gave any indication that this was a criminal charge and not a civil suit? We contend that there can be no waiver except one voluntarily made on a criminal proceeding, instituted, entitled and conducted so as to make it fully apparent that the accused is in jeopardy.

In addition to the foregoing constitutional deprivation, we feel that appellant was deprived of her constitutional right to a fair trial by the manner in which the court forced the proceedings to be heard. The thought is well expressed in assignments numbered XIII and XIV.

It will be recalled from the statement of facts that the order to show cause in this matter was made returnable in ONE day [p. 20]; that service of this order was made on appellant only a short time prior to the hour fixed for

the hearing [p. 37]; that appellant asked and was denied time to plead [p. 37]; that she asked and was denied time to answer [p. 37]; that she asked and was denied an opportunity to procure witnesses to testify in her behalf [p. 38]; that she asked and was denied a court reporter to record the proceedings [p. 39].

The thought naturally presents itself: Was this summary proceedure a violation of the due process clause of the Constitution? We submit that it was.

As said in *Boyd v. Glucklich,* 116 Fed. (C. C. A. 8th) 131, 134:

> "Dispatch in judicial proceedings is commendable, but in proceedings involving the libery of a citizen, he has a right, not only to be informed of the precise claim against him, but after receiving that information, he has a right to a reasonable time to prepare his answer and his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankruptcy Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt. The Bankruptcy Act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen. Construing the proceedings before the referee as we do, we think they were too summary in their character,

> and that it was against this summary proceeding the bankrupt asked to be heard, and that there was not accorded to him, and not intended to be accorded to him, by the referee, a reasonable time to answer the trustee's application, or to be further examined or to introduce evidence after being advised of the specific claims made against him by the trustee. The referee did not advise him that he had these rights, and the record does not show that he waived them, or intended to do so."

In *In re Dingley,* 182 Mich. 44, 148 N. W. 218, the court in criminal contempt proceedings made its order to show cause returnable in seven days and over the relator's attorney's protest that this date did not give sufficient time within which to present his facts, nevertheless the matter proceeded to trial. The appellate court held that a reasonable time must be given relator within which to appear and prepare his case, and that this was too hasty. It said:

> One of the earliest maxims with which the student of the law becomes familiar is that every alleged offender is entitled to his day in court before he is condemned. We quote from *Ferry v. Miltimore etc. Co.,* 71 Vt. 457, 45 Atl. 1035, 76 Am. St. Rep. 787:
>
> > "It is a rule as old as the law, and never to be more *respected* than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Our position cannot be more strongly put than by repeating the words "Judicial usurpation and oppression." We submit they most aptly characterize the proceedings below and for said reason, if none other, the conviction and sentence must be reversed.

POINT VII.

If Appellant Did, in Fact, Commit Contempt of Court Such Contempt Was Cured by Her Action in Turning Over Her Key to the Ninth Street Place of Business.

We do not concede that appellant did commit a contempt of court. The most that all the evidence, taken together and all accepted as true, shows she did is express extreme indignation and annoyance at appellee and the attorney representing the petitioning creditors upon the one occasion when appellee tried to take possession of the place of business of the Eustace Plumbing Company. The evidence does not disclose any disrespectful remarks concerning the court or its officers as such. The language used by appellant was mild compared with the language used by the defendants in the *Oswald* case, previously cited. Outside of the language used there is nothing charged against appellant. A mere threat to interfere with a receiver is not sufficient to constitute contempt. *In re McBryde,* 99 Fed. 686. Appellee nowhere testified that appellant committed any act of violence—that she participated in his eviction—or that she obstructed him in any way, except that she locked the door after all parties were outside the premises.

We cannot concede that anything so trifeling as this under the circumstances disclosed could constitute con-

tempt. But, if it did constitute contempt—if it can truthfully be said that appellee did, by such action and such talk, interfere with the possession of the Receiver—such contempt was cured.

As appears from the clerk's minutes of that date, at the conclusion of the hearing on September 12th, *appellant turned over to appellee in open court her key to the Ninth Street place of business* [p. 22]. We quote these minutes a second time:

> "The Receiver is instructed to take possession of the property, and the court having stated that if there is any interference with the Receiver, the court will be inclined to be severe about it, Mrs. Eustace turns over the key to Receiver E. A. Lynch in open court, and Mr. Griffith having thereupon been instructed to turn over the books to Receiver Lynch, on motion of R. Dechter, Esq.; at the hour of 5:23 p. m. recess is declared." [p. 22.]

Conceding, solely for the sake of argument, that appellant was the ostensible owner of the business in question; that she had the right and the duty to surrender it to appellee, and that she willfully refused to do so, thereby obstructing appellee in the performance of his duty, nevertheless, when appellant *in open court* repented her error and, by handing over the key, placed appellee in full possession, she thereby purged herself of contempt, and the subsequent sentence of a criminal nature for the past act was clearly erroneous. As was said in *Boyd v. Glucklich*, 116 Fed. 131 (C. C. A. 8th):

> "It should always be rememdered that the section does not give bankruptcy courts broader powers to punish for contempt than are possessed by other Fed-

> eral Courts. . . . The mode of proceeding in a court of bankruptcy to determine whether a constructive contempt has been committed should conform to the established practice in like cases in all other United States Courts, *and what is legally sufficient to purge the like contempt in the other courts of the United States is sufficient to purge contempt in a court of bankruptcy.*" (Italics ours.)

The cases heretofore cited distinctly hold that in a proceeding instituted, entitled and tried as this one, an unconditional sentence cannot lawfully be imposed. The only sentence the court could have lawfully imposed at the conclusion of the hearing on September 12th, had appellant still refused to surrender possession, would have been that she stand committed to jail *until she comply with the court's order.* Under such a sentence she would have held in her hands the keys to her prison, and by compliance with the order could at any time go free. How then, may it be said, that a greater sentence may be upheld when appellant complied with the court's order *in open court?* [p. 22.] We respectfully submit that appellant purged herself of all possible charge of contempt, and that the fine imposed after the contempt had been cured was wholly improper.

Conclusion.

In view of the foregoing and the authorities cited we respectfully submit that the judgment should be reversed.

Respectfully submitted,

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CHAS. W. FOURL,

Attorneys for Appellant Katie M. Eustace.

No. 7889

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
KATIE M. EUSTACE, etc.,
Alleged Bankrupt.

Katie M. Eustace and Chas. W. Fourl,
Appellants,
vs.
E. A. Lynch, etc.,
Appellee.

BRIEF OF APPELLANT CHAS. W. FOURL.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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BRIEF OF APPELLANT CHAS. W. FOURL.

STATEMENT OF FACTS.

This is an appeal from a judgment entered in the District Court of the United States for the Southern District of California, Central Division, by the Honorable Judge Cosgrave, in proceedings instituted within and *entirely conducted within* the above entitled bankruptcy matter, adjudging appellant to be in contempt of court [p. 128] and sentencing appellant to pay unto the UNITED STATES OF AMERICA a fine in the sum of one thousand dollars ($1000) and stand committed to custody until said fine shall have been paid [p. 135].

The following facts appear from the record:

On August 24, 1934, one A. M. Kupfer, a partner of Katie M. Eustace in an oil well venture, having a judgment of $49.95 [p. 7] against said Katie M. Eustace, joined with two other alleged creditors of said Katie M. Eustace on claims relating to the oil well and filed an involuntary petition in bankruptcy against Katie M. Eustace, alleged to be doing business as the Eustace Plumbing Company [Tr. p. 6].

It was stipulated on the hearing that none of said petitioning creditors were creditors of the Eustace Plumbing Company and that their claims had nothing to do with said Eustace Plumbing Company [p. 112] but "related to an oil well in which Mrs. Eustace and Mr. Kupfer were partners" [p. 108].

The involuntary petition is fatally defective in its jurisdictional facts but nevertheless this same partner alone, on his $49.95 claim [p. 108] on Sept. 7, 1934, filed a petition for a receiver [p. 13] for the alleged bankrupt, alleged to be doing business as the Eustace Plumbing Company [p. 11] and upon such petition *ex parte* and without notice, an order appointing a receiver of Katie M. Eustace, doing business as the Eustace Plumbing Company, was made [p. 13].

The order was general in its nature, described no particular property [p. 13], and required the petitioning creditor to put up a bond of only $500. [p. 11].

For more than thirty years the husband of Katie M. Eustace had conducted a plumbing business at various places in Los Angeles, and at the time herein involved had two locations within said city—one at 1246 East Ninth street and one on La Brea avenue [p. 95]. Said

husband, John M. Eustace, had filed a certificate of fictitious name which was published as required by law [p. 92] showing that he was doing business at these two locations under the name and style of "Eustace Plumbing Company."

Immediately upon qualification said receiver proceeded to 1246 East Ninth street, Los Angeles, where the "Eustace Plumbing Company" was doing business, and found there no one but a man named Stevenson working on a grinding machine, reconditioning some second-hand machinery [p. 53]. The receiver talked to the workman for a while and in about an hour the alleged bankrupt, Katie M. Eustace, and Chas. W. Fourl, appellants herein, appeared at the said East Ninth Street shop of the "Eustace Plumbing Company" [p. 54]. The receiver testified he gave the alleged bankrupt a copy of his order of appointment and demanded possession [p. 54]. It is admitted by all parties that thereupon appellants herein informed said receiver that John M. Eustace, the husband of Katie M. Eustace, was the owner of said business and had been such for more than thirty years [pp. 54, 61, 99], and that he had filed a certificate of fictitious name in the county clerk's office, which he had published according to law [p. 94]. Said certificate was read to said receiver by one of his men from the La Brea Street shop [p. 70].

Before this time, when appellee was on his way to the shop at East Ninth street, to demand possession, the said receiver met one Hiram E. Casey, an attorney, whom said receiver knew represented Katie M. Eustace [p. 40] and feeling the information would afford Casey a "good laugh," the receiver informed him that he was about to "CRASH" Mrs. Eustace [p. 39] but did not inform him

that proceedings had been started or of said receiver's appointment [p. 40]. Said Casey thereupon told the said receiver that he should stay away from the store of the Eustace Plumbing Company, that Katie M. Eustace had no interest in the business of the Eustace Plumbing Company, and directed his attention to the fact that if he went to the public records he would find a certificate of fictitious name, duly signed and filed and published showing John M. Eustace, the husband, was the owner of said "Eustace Plumbing Company" [p. 40]. Said receiver was also informed by appellants when he was at said place of business that a large amount of the equipment at said shop was owned by appellant Fourl which he had bought for use in construction of a large refinery at Long Beach and which he was then building [p. 57]. Said Chas. W. Fourl is, and was at all times, the attorney of John M. Eustace, authorized to do any and all things for and on his behalf, and so informed said receiver Lynch [p. 56].

Both the receiver and appellants remained at the store all afternoon of the day the receiver sought to take possession, the appellant Fourl telling him said receiver was a trespasser and an interloper and had no business there [pp. 56, 99], and that an examination of the order to show cause he had did not disclose he was entitled to take possession of this business [p. 99] claimed by, in possession of and owned by John M. Eustace. The receiver's attention was directed to the fact that the order required third persons to deliver possession of property in their possession only when the property was held by such party as agent, servant of Katie M. Eustace, and was owned by said alleged bankrupt [p. 99]. Much conversation took

place, the receiver saying he was going to remain there, the appellants telling him he was a trespasser and would have to go at the close of business [pp. 56, 99].

At about 6 o'clock p. m. appellants told the receiver the store was going to be closed for the day and he would have to go. He said that he could not do this as he did not want to be subject to criticism and that said Fourl would have to put his hands on him and he would leave [p. 100]. No force or violence was used. The said Fourl thereupon put his arm around the receiver's waist, and the two then walked through the outer door together, after which the place was locked [p. 100]. As one party spontaneously stated this "looks like a spring dance" [p. 82].

The following morning, Sept. 11, 1934, appellee filed with the District Court a "Petition of Receiver for Order to Show Cause *in re* Contempt and Restoration of Possession" [pp. 16-19]. Thereupon the District Court issued its "Order to Show Cause" directed to both appellants requiring them—at 2 o'clock p. m. Sept. 12, 1934—to show cause "why an order should not be made declaring them in contempt for interfering with the possession of the receiver herein at the premises at 1246 East Ninth street, Los Angeles, California, and why an order should not be made restoring possession forthwith of said premises to your "receiver," etc. [p. 20].

Time for service of this order was shortened to one day [p. 20].

No service of said order was made upon appellant so the cause was continued to Sept. 21 [p. 47]. Service was made on the alleged bankrupt a short time before the

matter was called for hearing at 2 o'clock p. m. on Sept. 12, 1934 [p. 37].

The record discloses that, despite the request of counsel for the alleged bankrupt for time to plead and prepare a defense or summon witnesses, the hearing proceeded *that afternoon* [p. 37]. The following is the concluding paragraph of the clerk's minutes for that day:

> "The Receiver is instructed to take possession of the property, and the Court having stated that if there is any interference with the Receiver, the Court will be inclined to be severe about it, Mrs. Eustace turns over the key to Receiver E. A. Lynch in open court and Mr. Griffith having thereupon been instructed to turn over the books to Receiver Lynch, on motion of R. Dechter, Esq.; at the hour of 5:23 p. m. recess is declared." [p. 22.]

Later appellant appeared specially by counsel Sept. 21, 1934, and objected to the jurisdiction of the court "to proceed summarily to try and determine the good faith claim of said Chas. W. Fourl, as agent and attorney for John M. Eustace, of said John M. Eustace's ownership, possession and right of possession of said plumbing shop and business at 1246 East Ninth Street, Los Angeles, California." The special appearance was overruled and an exception noted [p. 47].

Appellant then filed a motion to dismiss on the several grounds appearing in the record [p. 48], urging, among other objections, "That said petition and order, either singly or together, are not sufficient in form to show or to

advise this respondent whether it is intended to charge him with a civil or a criminal contempt." This motion was likewise overruled and an exception noted [p. 49].

Appellant thereupon served and filed his verified answer to the petition [pp. 27-35], WHICH THE COURT REFUSED TO READ [pp. 49-51]. Thereupon the cause proceeded as designated by the court as "An informal hearing" [p. 86]. The court refused to follow rules of evidence as would have been done in a case on trial [p. 86]. He refused to classify the proceeding as "civil" or "criminal" [p. 71]. At no stage of the proceedings was the United States brought in as a party. At no time did the District Attorney attend or take part in them. No evidence was introduced as to any damage suffered by anyone by the acts of appellant. Appellant was found guilty and sentenced to pay unto the *United States of America* a fine in the sum of *one thousand dollars* ($1000) and stand committed to the custody of the United States Marshal until said fine shall have been paid [p. 135].

Questions Presented.

The questions presented and which will be argued in this brief may be stated as follows:

(1) Is a contempt proceeding entitled in a bankruptcy cause, conducted by counsel for the petitioning creditors and not by the United States District Attorney and praying that appellant be held in contempt of court and requiring possession of certain premises be restored to *the re-*

ceiver and for an injunction, a criminal proceeding in which appellant can be fined and required to pay a fine to the United States of America? Was not the sentence imposed appropriate only to a criminal contempt?

(2) The appointment of a receiver *ex parte,* where the procedings are fatally defective, and where petition fails to state any jurisdictional facts warranting such relief, is void, and no contempt is committed by resisting his efforts to take possession of property under such void appointment.

(3) Did the order in this cause [p. 13] appointing the receiver and giving him his authority and authorizing said receiver to take possession of all property owned by or in possession of said alleged bankrupt authorize said receiver to take possession of the business of John M. Eustace, appellant's client, and an adverse claimant?

(4) Was not the cause herein so conducted as to deprive appellant of his constitutional rights and in violation of due process clause of the United States Constitution?

(5) Were not errors of law made in such hearing in the admission and rejection of evidence of such character as to prejudice the appellant and prevent him from having a full and fair trial on the merits?

ASSIGNMENTS OF ERROR TO BE NOTED.

Assignments of error numbered I to XXI, with the exception of VIII and XVI, will be hereafter noted and argued and will be quoted under appropriate points.

POINT I.

Observance of Procedural Distinction Between Civil and Criminal Contempt Is Jurisdictional.

The lower court had no jurisdiction to impose a fine payable to the United States and order appellant to stand committed to the custody of the United States Marshall until the fine is paid, in a contempt proceeding entitled in a bankruptcy proceeding, the United States not being a party, and the cause not being prosecuted either by information or indictment, but being conducted entirely by counsel for the receiver for whose benefit the proceedings were prosecuted.

In connection with this point we note the assignments of error numbered II, III, IV, V, VI and VII [pp. 140-141], all of which, in varying language, present the point. For convenience they are repeated here:

(No. II.) The court erred in permitting the proceedings instituted and tried as civil proceedings to go to final judgment in criminal contempt.

(No. III.) The court erred in finding Chas. W. Fourl guilty of criminal contempt on evidence produced in a civil proceeding.

(No. IV.) The court erred in finding Chas. W. Fourl guilty of a criminal contempt without any charge of criminal contempt ever having been brought against him.

(No. V.) The court erred in exercising criminal jurisdiction in a civil proceeding in which no criminal jurisdiction exists.

(No. VI.) The court erred in finding Chas. W. Fourl guilty of a criminal offense against the United States of America in an action in which the United States of America is not now, nor ever has been, a party.

(No. VII.) The court erred in refusing to dismiss the whole proceedings against Chas. W. Fourl upon the conclusion of the entire case.

Exception No. 26 [Tr. p. 116], and exception No. 27 [Tr. p. 116], cover these assignments of error.

It is our contention that the authorities hereinafter cited clearly establish the principle that proceedings to punish for constructive contempt must be either civil or criminal; that if the object sought is coercion or an enforced compliance with the court's order theretofore made, the proceeding must be instituted and conducted as a civil proceeding and that the punishment imposed shall be only such as is appropriate thereto, to-wit, imprisonment until the order of the court is complied with; that if the object sought is punishment for a past act, as in vindication of the court's authority, then the proceeding must be instituted, entitled and tried as a criminal proceeding, that is to say, the United States of America must appear as the complainant, the proceding must be instituted by the District Attorney, and that when punishment is imposed in *such* proceeding, then and only then can sentence be to a definite and fixed term of imprisonment or a definite sum as a fine.

Both the petition for an order *in re* contempt and restoration of possession [pp. 16-19] and the order to

show cause *in re* contempt, issued thereon [p. 20] seek three things: First, an adjudication of contempt against appellants; second, an order restoring possession of certain premises forthwith to the receiver; third, a restraining order against future interference with said premises, all of which are civil matters.

At the conclusion of the hearing as to the appellant, Katie M. Eustace, the court found her guilty of contempt verbally and on the same day entered a written order thereon [p. 23] finding her guilty of contempt and granting all civil relief prayed for in the order to show cause, which order of September 13, 1934, was later set aside as to appellant Katie M. Eustace and a new order *in re* contempt made, dated Sept. 25, 1934 [pp. 129-133], which confirmed all civil relief theretofore granted by the previous order. This order of Sept. 25, 1934, was directed to be entered *nunc pro tunc* as of Sept. 22, 1934 [p. 133]. This latter was signed by the court and entered after the imposition upon appellant of a fine of ONE THOUSAND DOLLARS, payable to the United States of America, and imprisonment until said fine was paid [pp. 134-135, p. 137], and after an appeal had been perfected by appellant Fourl on Sept. 24, 1934 [pp. 139-145].

This order which was in the nature of findings of fact and conclusions of law has no place in a criminal proceeding and could only be appropriate to a civil proceeding.

Indeed, the court's idea as to the character and nature of the proceedings is best indicated by the statement he made with respect to an objection to the admissibility of certain hearsay statements offered by the receiver. The court said:

> "No, that would be true in a case on trial but this is an *informal* hearing, understand. The court makes up his mind here from all the facts and circumstances produced" [p. 86].

The order to show cause, as pointed out, was made on Sept. 11, 1934, and returnable Sept. 12, 1934. What opportunity could one have for preparing one's case; summon witnesses, prepare pleadings for a criminal case? It was obviously originally intended by the attorneys as a turnover order. Appellant Eustace was caused to go to trial on the case on the day following the order to show cause, the court refusing her attorney a continuance to summon witnesses [p. 38] or time to prepare written pleadings [p. 38] and forced her to trial at once [p. 39] and also refused her a reporter [p. 39]. Exceptions were taken to these acts.

As to appellant Fourl, since service was not made prior to the return date the hearing was conducted a week later, to-wit, Sept. 24, 1934. Appellant Fourl filed a written answer [pp. 27-35] which the court refused to read [pp. 49-50] and a motion to dismiss was made [p. 48].

The foregoing gives this court somewhat of an idea as to the conduct of the proceedings as they were had in the lower court. The pleadings and orders in the case all show they were only in a civil cause.

Every paper and proceeding in this cause was entitled in, initiated in and prosecuted in the said bankruptcy proceeding, even including the sentence [pp. 134-135]. The petition for an order to show cause *in re* contempt and restoration of possession [p. 16] was entitled in the bankruptcy matter of Katie M. Eustace, alleged bankrupt [p. 16] and was on behalf of E. A. Lynch, receiver in bank-

ruptcy [p. 16], signed by E. A. Lynch [p. 16] and prayed for an order to show cause why Katie M. Eustace and Chas. W. Fourl should not be held in contempt of court for interfering with the possession of the receiver of certain premises and why possession of said premises should not be restored forthwith to such receiver [p. 16]. The order to show cause [p. 20] *in re* contempt recites it is upon petition of the receiver and follows the prayer of the petition seeking a declaration of contempt against Katie M. Eustace and Chas. W. Fourl and *restoration to the receiver of possession of said premises* [p. 20]. The receiver was represented by the attorney for the alleged creditor on the hearing [pp. 21, 22, 23; pp. 133-137; pp. 129-133] and the orders [p. 23, pp. 134-37] finding appellants guilty of contempt all are entitled in the bankruptcy proceeding and show such attorney and the receiver were the moving parties at all times. Nowhere does it appear the United States of America has any part in the proceedings. Neither the petition *in re* contempt, the order to show cause *in re* contempt [p. 20] nor any other paper in the cause indicate that it is sought to punish appellants by fine or otherwise for a criminal act.

The court at the conclusion of the "INFORMAL HEARING" found the appellants *guilty* of contempt and continued *sentence* to a certain date [p. 128]. When the time arrived for sentence of appellants the court treated the case as a criminal one, and sentenced appellant Chas. W. Fourl [pp. 134-135] to pay a fine of $1000 to the United States of America, and the same sentence was given to appellant Katie M. Eustace [p. 137]. No showing of damages or injury to anyone, such as would have been necessary had the proceeding been deemed a civil one, was either pleaded or proved.

A civil proceeding, initiated as such, conducted informally [p. 86] was thus at time of judgment and sentence treated as a criminal matter. This is such a variance between the procedure adopted, the conduct of the proceedings and the punishment imposed as to be a deprivation of substantial rights of the appellants. The leading case on this subject is *Gompers v. Bucks Stove, etc. Co.,* 221 U. S. 418, 444, wherein the court imposed imprisonment for contempt of court in violating an injunction in a civil suit but gave nothing to the Bucks Stove Company; the court said:

> "If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or by appeal. Bessette v. Conkey, 194 U. S. 324. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. Boyd v. U. S., 116 U. S. 616; United States v. Jose, 63 Fed. Rep. 951; State v. Davis, 50 W. Va. 100; King v. Ohio Ry., 7 Biss. 529; Sabin v. Fogarty, 70 Fed. Rep. 482, 483; Drekeford v. Adams, 98 Georgia 724.

There is another important difference. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main case. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause. The Court of Appeals recognizing this difference held that this was not a part of the equity cause of the Bucks Stove & Range Company v. the American Federation of Labor *et al.*, and said that 'The order finding the defendants guilty of contempt was not an interlocutory order in the injunction proceedings. It was in a separate action, one personal to the defendants, with the defendants on one side and the court vindicating its authority on the other.'

In this view we cannot concur. We find nothing in the record indicating that this was a proceeding with the Court, or more properly, with the Government, on one side and the defendant on the other. On the contrary, the contempt proceedings were instituted, entitled, tried, and up to the moment of sentence treated as a part of the original case in equity. The Bucks Stove & Range Company was not only a nominal, but the actual party on the one side, with the defendants on the other. The Bucks Stove Company acted throughout as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States, prosecuting the case for criminal contempt. It appears here also as the sole party in opposition to the defendants; and its counsel, in its name, have filed briefs and made arguments in this court in favoring affirmance of the judgment of the court below.

But, as the Court of Appeals distinctly held that this was not a part of the equity cause it will be proper to set out in some detail the facts on this subject as they appear in the record.

In the first place the petition was not entitled 'United States v. Samuel Gompers *et al.*' or *In re* Samuel Gompers *et al.*' as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charges against him, but to know that it is a charge and not a suit. U. S. v. Cruikshank, 92 U. S. 542, 559."

The same rule was applied in *In re Kahn,* 204 Fed. 581, 582. The court said:

"Applying then the principles of the Gompers Case it is evident that when it appears that a sentence to a fixed and absolute term of imprisonment has been imposed it can be justified only by showing that it was inflicted in a proceeding for criminal contempt. Such a punishment was imposed in this case. Nothing the defendant could have done would have prevented his imprisonment for the full term of ten days. That part of the punishment was to vindicate the authority of the court. The coercive part—the part to aid the complainant—did not become operative un-

til after the punitive part had been complied with. The latter must be supported, if at all, by establishing that it was made in a criminal proceeding.

Were the proceedings criminal in their nature? The most important question bearing upon this as to whether they were between the public and the defendant. They were not. The government did not prosecute nor did anyone claim to act in its behalf. The complainant was the attorney for the receiver in bankruptcy and the contempt proceeding was really in favor of the latter. The petition was not entitled as in a criminal case. The order bore the title of the main bankruptcy proceedings. The prayer for relief was for an adjudication in contempt and for further relief of the petitioner. All the indicia of the civil cause incidental to the proceedings in bankruptcy, and none whatever of a criminal case, were present. The situation was precisely that stated in the Gompers Case:

'A variance between the procedure adopted and punishment imposed, when in answer to a prayer for relief in the * * * (civil) cause the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt.'"

The decision of the Supreme Court of the United States in the *Gompers* case was held to be directly applicable to contempt cases arising in the bankruptcy courts by the 8th Circuit Court of Appeals in its decision of the case of *Wakefield v. Housel,* 288 Fed. 712, where the proceedings were instituted, entitled and tried as part of a bankruptcy matter, by counsel for the creditors.

In this case just mentioned the opinion of the Eighth Circuit drawns an analogy between the facts of the case

there and the facts of the *Gompers* case. In the following quotation from that case we have drawn the analogy further to show that both decisions are clearly controlling in the case at bar:

> "The question recurs: Was the proceeding which has been described, and upon which this judgment of criminal contempt is based, 'instituted and tried as for criminal contempt?' The Supreme Court noticed and specified these indications that the contempt proceeding in the Gompers case was not so instituted and tried: (1) That there was nothing in the record indicating that the court or the government was on one side of the contempt proceedings and the defendants on the other. There is nothing in the case at hand so indicating." (*Nor is there anything in the record of the case at bar to so indicate.*) "(2) That the contempt proceedings were instituted, entitled and tried as a part of the original suit in equity. So was the contempt proceeding here. The referee's certificate of contempt, the petition to the District Court for the order to show cause, and the order of the court adjudging Wakefield in contempt were entitled: 'In the Matter of Butler-Williams-Wakefield Motor Company, a Copartnership Composed of E. M. Butler, R. L. Williams and S. L. Wakefield, and E. M. Butler, R. L. Williams and S. L. Wakefield, Individuals, Bankrupts. In Bankruptcy No. 1712.'" (*In the case at bar, the "Petition of Receiver for an Order to Show Cause in re Contempt and Restoration of Possession." The order to show cause, and the order of the Court adjudging appellant guilty of contempt were each entitled: "In the matter of Katie M. Eustace, etc., Alleged Bankrupt."*) "(3) That the Bucks Stove & Range Company, through its counsel, conducted the proceeding for the adjudication of

> contempt, not as a representative of the United States or of the Court, but for itself, and its counsel, in its name, filed briefs and made arguments for affirmance of the judgment in the appellate court. This is equally true of the trustee in bankruptcy and his counsel in this contempt proceeding against Wakefield."

And we may add, *it is equally true in this contempt proceeding.* This striking analogy between these cases should leave no doubt in the minds of this court as to the fatally defective character of the proceedings below. Additional definitions of and the distinctions between civil contempt and criminal contempt may be found in *In re Nevitt,* 117 Fed. 448, 458, 54 C. C. A. 622, and *Bessett v. W. B. Conkey Co.,* 194 U. S. 324, 328, 24 Sup. Ct. 665, 48 L. ed. 997.

In a very recent case decided January 21, 1935, *In re Guzzardi,* 28 Am. B. R. (N. S.) 130, the Second Circuit Court of Appeals has reaffirmed its earlier decision of *In re Kahn,* 204 Fed. 481, and because of being so recent and its statement of principles involved we quote therefrom at length.

The court said (28 Am. B. Rep. (N. S.) 130:

> "The bankrupt appeals from an order of the bankruptcy court sentencing him to 60 days' imprisonment for contempt of court. The proceeding was commenced by an order to show cause, supported by the petition of the trustee in bankruptcy, both entitled in the bankruptcy proceeding. The order required the bankrupt to 'show cause why he should not be punished for contempt of court for interfering with the orders of this court and with the administration of the estate . . . and in concealing

and inducing disobedience of the witnesses to the orders of this court and why he should not be directed to produce for examination . . . Josephine Quartucci, Caroline Quartucci and John Quartucci.' The petition stated its purpose in substantially similar form, speaking, however, of the production of the witnesses as 'additional or alternative relief.' It concluded with a prayer 'that the bankrupt should be punished for contempt of court and should be directed to produce his relatives as witnesses and that he be stayed and enjoined from interfering with the processes of this court and from harboring these witnesses.' The bankrupt filed an affidavit containing argumentative denials of the petition, and the case went to trial before the judge. . . . The most important question is whether the proceeding was obviously criminal from the outset, or from a time early enough to advise him and protect his rights. To prove that it was, the trustee relied especially upon the process and the petition which asked that he be 'punished' for having interfered with the processes of the court, and upon the repeated declarations of the judge during the hearings that the proceeding was to 'punish' him for contempt. Again, he relied upon the reply to the court, after sentence, of the attorney for Caroline Quartucci acting apparently for the bankrupt, at the moment that he had assumed from the way the proceeding was going, that he would be imprisoned.

The great importance attached to the characterization as criminal of a proceeding to punish for contempt, dates from Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, before which the practice had been looser. The Supreme Court there set out the

elements which persuaded it that that proceeding had been civil. We read the opinion, not as making crucial any one detail, but rather as summing up the features of a portrait which as a whole was plainly recognizable. If so, our duty here is to learn how far the case at bar may be superimposed upon the facts there. That proceeding was prosecuted by the party aggrieved; it was apparently a part of the civil proceedings in chief, being so entitled; the plaintiff asked costs, and called the respondents to the stand; there was a clause in the prayer asking general relief. The facts here are parallel except that the trustee did not call the bankrupt to the stand and asked no costs. Nevertheless the character of the charge at bar was as equivocal as there; to demand that the respondent should be 'punished' did not tell him that he stood in jeopardy of an unconditional imprisonment. 'Punishment' is a word apt for civil contempts and constantly so used. Thus, if a man be imprisoned for violation of a decree till he complies with it, he would regard himself as 'punished' thought he could get out when he chose. Again, he would think that he was 'punished' if he were fined the expenses of a civil proceeding, as he might be. It does not distort the language of process to say that the trustee might have meant only to put pressure upon the respondent to produce the witnesses named, by locking him up until he did produce them and fining him for the expenses after he had. Again, some part of the relief asked was civil in any event, and the proceeding bore every evidence of being part of the bankruptcy proceedings. Finally, it was prosecuted by the trustee without the initiative of judge or district attorney. In our opinion its criminal aspect was for these reasons not marked clearly enough to support an uncon-

ditional sentence of imprisonment. Bradstreet Co. v. Bradstreet's Collection Bureau (C. C. A., 2d Cir.), 249 F. 958; Shulman v. United States (C. C. A., 6th Cir.), 9 Am. B. R. (N. S.) 836, 18 F. (2d) 579; Monroe Body Co. v. Herzog (C. C. A., 6th Cir.), 18 F. (2d) 578; Wakefield v. Housel (C. C. A., 8th Cir.), 1 Am. B. R. (N. S.) 664, 288 F. 712; Mitchell v. Dexter (C. C. A., 1st Cir.), 244 F. 926.

We have ourselves gone further and flatly decided that unless the charge be prosecuted by the district attorney, it cannot be considered as criminal at all. *In re* Kahn (C. C. A., 2d Cir.), 30 Am. B. R. 322, 204 F. 581. That would be conclusive upon us now, were it not, that in three other circuits it seems to have been assumed that this was not a *sine qua non,* though there was little or nothing said about it in the opinions. Kreplik v. Couch Patents Co. (C. C. A., 1st Cir.), 190 F. 565; *In re* Star Spring Bed Co. (C. C. A., 3d Cir.), 30 Am. B. R. 208, 203 F. 640; *In re* Kaplan Bros. (C. C. A., 3d Cir.), 32 Am. B. R. 305, 213 F. 753; Wingert v. Kieffer (C. C. A., 4th Cir.), 12 Am. B. R. (N. S.) 648, 29 F. (2d) 59. Cf. Monroe Body Co. v. Herzog, *supra.* In spite of these decisions there can, however, be no doubt that prosecution by the judge *sua sponte,* or by the district attorney, is an important factor in deciding the issue. In the case at bar it was especially important. An assistant district attorney was present during the hearings, or at least for a part of them, observing, but taking no part. Apparently he wished to keep aloof and merely to learn whether anything would transpire to show that a crime had been committed. His presence without participation was surely misleading if a criminal prosecution was in progress; and while the district attorney did indeed seek to

intervene upon this appeal, it was then too late. So far as the doctrine is serviceable at all, it can only be to advise the accused of the nature of the claim; and it serves him not at all after the event.

It is perhaps a misfortune that the result should depend upon the form of the proceeding, and it is quite likely that in fact the bankrupt knew what the consequences to him might be, quite as well as though he had been expressly so told. But whatever the value of the distinction, we must assume that Gompers v. Bucks Stove Co., *supra,* 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 787, 34 L. R. A. (N. S.) 874, is still the law, and we must give it its proper effect, so far as we can see. Besides, it is of at least some practical consequence to the respondent in such a proceeding to know whether he is charged with crime; the outcome may be severer, and the degree of proof is higher; his conduct may be governed accordingly. We do not say that this must be known at the outset; it is enough if it becomes manifest in season; but manifest it must be, and not for the first time on appeal. Nor does the requirement involve any hardship to the party who promotes the cause, unless he is really bent upon prosecuting and controlling a criminal proceeding as his own. There is no reason why its character should not be expressly declared at the outset and the initiative of the judge secured, or that of the district attorney. If counsel see fit to leave this feature of the cause *in nubibus* they have themselves to thank for the eventual miscarriage. We will not go through a record, catching at straws, which lead us first one way and then another, and in the end force us to guess about a matter which could be so easily set right at the beginning."

While in the *Guzzardi* case the prayer of the order and petition indicated that the defendants were to be punished, no such prayer occurred here (pp. 18-20).

In *Anargyros v. Anargyros,* 191 Fed. 208 (Cal.), which was a proceeding for violation of a preliminary injunction, the moving papers prayed that respondents be required to show cause why they should not be attached for contempt in the doing of certain acts which were alleged to be in violation of the rights of complainant and the preliminary injunction. The papers were entitled in the civil suit. Said court, in discussing certain parts of the prayer, said:

> "These averments, while entirely appropriate to a proceding for compensatory relief, are largely unnecessary, if not inappropriate, to one seeking the punishment of a contemnors in vindication of the authority of the court.
>
> On the other hand, if the proceeding is intended as one of a punitive character, the moving papers are wholly insufficient in matters of substance, to advise the respondents of that fact.
>
> A contempt for which one may be punished by fine or imprisonment, purely in vindication of the authority of the court and to sustain the majesty of the law, is in its nature a distinct criminal offense and must in some appropriate form be laid as such.
>
> While the nicety and precision of an indictment may not be required, the pleading or affidavit must not only specify clearly the acts which the contemnor will be called upon to meet, but it must quite as clearly, in some form, advise him that the judgment sought against him is one of a punitory character; otherwise he is to conjecture as to whether it is a

proceeding merely to mulct him in damages for the benefit of a moving party, or one to have him punished by fine or imprisonment as for a criminal act. Here, while the specific acts complained of are, I think, stated with sufficient certainty, there is nothing to clearly indicate that the complainant is seeking to have the respondents answer for anything beyond damages for its private benefit. It is alleged that the acts done were in violation of the injunction; but that was essential to either form of relief. It is asked that respondents be 'attached for contempt'; but that demand is likewise equally appropriate to either character of pleading. Furthermore, there is an entire lack of any prayer, demand, or suggestion that respondents be punished in any manner. While such specific demand is perhaps not essential to enable the court to afford relief of a private and remedial character appropriate to the facts, it is very clearly essential in a proceeding seeking the punishment of a respondent as for a criminal contempt; and especially should this be so where there is an absence of anything else in the pleading to definitely point the nature of the judgment sought. Moreover, as suggested in the Gompers case, it is inappropriate in a criminal contempt to entitle the proceeding in a civil case; that of itself being indicative that the proceeding is merely a part of the main controversy and for a civil and remedial purpose.

A criminal contempt is no part of the main case; it is a proceeding independent and apart, in the nature of a criminal prosecution, and should have a title of its own, proper to indicate its character. As aptly said in that case in speaking of like defects:

'This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by mere

> inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge, and not a suit. United States v. Cruikshank, 92 U. S. 542, 559, 23 L. Ed. 588, 593.'
>
> These defects, therefore, partake of the substance, and render the moving papers insufficient to properly advise the respondents that they were charged with a criminal contempt, and consequently the record affords no sufficient foundation upon which to base a judgment of a punitory nature."

Furthermore, we feel that appellant was entitled to know *whether or not he was in fact in jeopardy.* We have previously pointed out that under the authorities he was entitled to know that the matter was a *charge* and not a *suit.* (The *Gompers* case.) Surely then, when a hearing is in progress, it would not do violence to established authority to let it be clearly known to the accused whether the matter before the court is in the nature of a preliminary hearing or an actual trial. And if it be an actual trial, that the accused will be afforded a full opportunity to defend himself. Yet the court below refused to inform appellant of the nature of the proceedings. He called it an "*informal* hearing" [p. 86], refused to be guided by rules of evidence [p. 86] and declined to state whether the proceeding was civil or criminal [p. 71]. He refused to allow appellant to properly examine or cross-

examine witnesses—he compelled the proceeding to proceed at irregular hours and intervals—and afforded appellant only a hurried and limited hearing. All of which we assigned as error No. 20.

Requirements as to form and procedure are founded upon sound reason and the experience of mankind and independently of any technicality of the law, this should be so in cases such as this. None are blind to the fact that the intricacies of the bankruptcy law and the powers of the Federal District Courts are sometimes sought to be used by unscrupulous persons in bludgeoning weak but solvent industrialists into submission to their demands. That such should be is a reflection not upon the courts but upon human nature. What more powerful arm could such designing racketeers have that the charge of contempt of court, skillfully planted, and personally prosecuted, without regard to the forms of law, nor the constitutional rights of citizens. The district attorney is an officer of the court, sworn to uphold its majesty. He may be expected to be calm and impersonal and not to rush hastily into court without thorough investigation. If, in fact, a crime has been committed, he may be trusted to proceed in an orderly manner in a way which will leave no doubt in the mind of anyone as to the character of the proceeding. The absence of the element of personal greed or vindictiveness should react favorably upon the respect at all times due the proceedings of the federal courts. Our position is that the use of the great power which the federal courts have should be so carefully safeguarded that even the appearance of evil would at all times be scrupulously avoided.

POINT II.

There Was No Jurisdiction to Impose a Large Fine in This Case When No Evidence Was Introduced Even Tending to Show Damages or Injury Suffered by Appellee.

Assignment of error No. XVIII [Tr. p. 143] covers this ground.

This fine, as heretofore pointed out, being made payable to the United States of America in a civil proceeding to which said United States was not a party, was clearly beyond the power of the court. No citation of authority is necessary to establish that a judgment in favor of a third party not a party to the suit is beyond the court's jurisdiction.

Again the record is wholly devoid of any suggestion of proof that any act of appellant had caused any damage. Certainly there is no proof that the United States had suffered damage and none can be inferred. Likewise there is no attempt to prove that appellee suffered damage. Of course, if the matter is civil, then a fine to the United States is unauthorized. As was said in *Dakota Corp. v. Slope Co.* (N. D.), 75 Fed. (2d) 585 (C. C. A. 8):

> "It is true that, in a proper case, a court has power, in a proceeding in contempt, to impose a fine upon the contemnor for the benefit of the party injured. But here we have neither disobedience of a court order nor evidence of damage to the subject-matter."

And in *Judelshon v. Black* 116 Fed. (2d) 166 (C. C. A. 2):

> "The theory of recovery in a civil contempt proceedings is to compel the payment of damages by way of a fine, and, since no damages were suffered, there should be no finding of contempt."

So, while conceding that, had a showing been made of damage actually suffered, a fine, payable to appellee, might have been rightfully imposed, it is our contention that, in the absence of any showing of damage, a fine payable to the United States, in a large sum, is wholly unsupportable in law.

POINT III.

Receiver Not Authorized to Seize Property Adversely Claimed—Burden of Proof.

A.

The argument between the receiver and appellants arose over the question of his authority to take possession of the business and assets of the "Eustace Plumbing Company."

The authority for the appointment of a receiver in bankruptcy procedings comes from the Act and is limited by the Act. The order of the court appointing him cannot be broader than the statute.

> *Boonville etc. Bank v. Blakey*, 107 Fed. 891 (C. C. A. Ind.).

Elsewhere we contend that the moving papers did not authorize an order to appoint a receiver, but irrespective of this, even assuming that this order is valid, we contend

the court did not and could not justify or authorize the seizure of the property herein involved, owned by a third party and adversely held and possessed by such third party.

In *In re Kolin,* 134 Fed. (C. C. A. Ill.), 557 the court said as to a receiver:

> "Yet he is not authorized, nor can the bankruptcy court properly direct him to take possession of property held and claimed adversely by third parties." Citing, Boonville etc. Bank v. Blakey, 107 Fed. 891; Bardes v. Hawaidine Bank, 178 U. S. 524, 538.

See also:

In re Ward, 104 Fed. 985;

In re Kelly, 91 Fed. 504.

It is appellant's further contention that the said receiver Lynch was exceeding his authority in endeavoring to take possession of said property. Furthermore, we contend that if said order can be interpreted so as to authorize the seizure of such business of a third party, it is of no force or effect and in excess of the court's jurisdiction.

Our assignment of error numbered XV raises this point and reads as follows: "The court erred in finding Chas. W. Fourl guilty of criminal contempt and sentencing him when the order appointing the receiver in the above matter did not direct such receiver to take possession of the property concerning which the said Chas. W. Fourl is found guilty of contempt."

This order of appointment [pp. 13-15], appointed appellee receiver "of all property of whatsoever nature and wheresoever located, now owned by or in possession of

said bankrupt and of all and any property of said bankrupt and in possession of any agent, servant, officer or representative of said bankrupt." It will be noticed that it did not describe any particular property or any particular premises, nor did it authorize him to take possession of the property of any third person or particularly the property of John M. Eustace. The third paragraph of said order [p. 14] provided that all persons, firms and corporations, including said bankrupt, deliver to the receiver all property of whatsoever nature and wheresoever located *"in the possession of them or any of them and owned by said bankrupt"* [pp. 13-14].

The command to this appellant and other third persons [p. 14] is to deliver to the receiver all property in their possession and control *and owned by said bankrupt* [p. 14]. *Ownership of the property* sought to be taken was an essential matter in determining what the receiver could take possession of and what such third party was authorized to deliver over or the receiver to receive. Union of possession and ownership by the alleged bankrupt was the criterion provided for.

The court said before any witnesses were sworn at the Fourl hearing that the question involved solely depends on the ostensible ownership [p. 50], and would not allow us to show ownership and possession in the husband for some thirty years [p. 51] or the certificate of fictitious name filed and published as required by law [p. 93]. This certificate was read to receiver Lynch [p. 70] and he was advised of such certificate, and appellants both notified him of the ownership and possession of John M. Eustace.

We believe the rule applicable here is as follows:

> "Third parties having at the time of the bankruptcy possession of the tangible property or funds involved, under claim of a beneficial or adverse interest therein, cannot be obliged to surrender them, nor can third parties owing debts to the bankrupt at the time of the bankruptcy, be obliged to pay the debts, nor can such parties be obliged to submit their rights in such property, funds or debts for determination to the bankruptcy court, by summary proceedings in the bankruptcy proceedings, even on notice and hearing: Such property, funds or debts thus owed or adversely held, are to be reached only by instituting plenary suits, in which the parties may be brought into court by due service of summons or subpoena, pleadings may be filed, issues joined and trial had, in accordance with the usual forms of procedure."

Remington on Bankruptcy, Sec. 2134;

In re Teschmacher & Mrazay, 11 A. B. R. 549, 127 Fed. 728 (D. C. Pa.);

Bardes v. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000, 4 A. B. R. 163;

Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, 8 A. B. R. 224;

Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293, 7 A. B. R. 421;

Jacquit v. Rowley, 188 U. S. 620, 47 L. ed. 620, 23 Sup. Ct. Rep. 369, 9 A. B. R. 525.

We feel that we are entitled to rely on a recent decision of this circuit as sustaining our position. We quote from *Oswald v. United States,* 71 Fed. (2d) 255 (June, 1934):

"On Sept. 9, 1933, one Marion Newman was, on an *ex parte* motion, appointed receiver for a corporation known as Southern California Kennel Club, Inc. The order appointing the receiver authorized him to take possession of all the property of said corporation. On the night of September 9, 1933, the receiver Newman, with a United States Marshal and an attorney went to the dog racing track, called the Southern California Kennel Club where dogs were being raced. The Marshal went for the purpose of serving a copy of the order appointing the receiver on an officer of said corporation. After arriving at the dog track, one of the employees at the track let Newman, his attorney and the Marshal in a room where approximately $8,500 in cash was lying on tables. The Marshal served George H. Oswald, president of the corporation, Southern California Kennel Club, Inc., with a copy of the order appointing Newman receiver. The defendants were informed Newman was receiver of said corporation, at which time, Newman, as receiver of said corporation, requested possession of the $8,500 and also the dog track and the equipment. Geo. H. Oswald told Newman, the receiver, that there were no assets belonging to the corporation. Thereafter the said Oswald and the other defendants 'with force and violence' expelled the said receiver from the premises."

Thereafter, criminal contempt proceedings were filed against the defendants, they were tried before the Honorable George Cosgrave, convicted and an appeal allowed.

Throughout the progress of the case the appellants insisted that the Southern California Kennel Club, Inc., owned no property that was in their possession, and de-

manded by appropriate motions and objections that the government indicate what property it was claimed they had refused to turn over to the receiver and what property was owned by the corporation.

The government made no proof whatever that the corporation owned the dog race track or the money in the defendants' possession. The defendants claimed that the money and property belonged to defendant Nick Oswald.

This court reversed the conviction on the ground that there was no evidence to support the conclusion that the corporation owned anything at the place where the alleged contempt occurred. The court said:

> "The government did not sustain the burden of proof and the defendants affirmatively established that there was nothing in their possession which the order required to be delivered to the receiver. Even if the trial court discredited the testimony of the defendants tending to affirmatively establish their ownership of the property, there was no evidence to establish ownership of the property by the corporation, hence there was no contempt in refusing to deliver the property demanded because the order of the court accompanying the demand showed that the demand was unauthorized. * * * We must assume that the property demanded was not covered by the order, that the receiver had no right to go upon the property or to remain there against the wishes of the lawful owner and that the refusal to turn over the property and expulsion of the receiver was proper if no unnecessary force was used * * *
>
> *"The order of the court appointing the receiver directed him to take charge of all property belonging*

to the corporation. He had no authority to demand possession of property that did not in fact belong to the corporation. Neither did the order require the appellants to turn over property that belonged to them. If the property demanded had been identified in the order other than by its ownership, the situation would have been different." (Italics ours.)

It needs but little demonstration to show that the foregoing case is on all fours with the case at bar. In that case the receiver was appointed *ex parte* by the Honorable George Cosgrave. The same is true here. The order appointing the receiver authorized him to take possession of ALL the property of the corporation but did not contain specific reference to ANY property. The same is true in the case at bar. The receiver there went to the place where he believed the corporation was carrying on business, secured admission through an employee, served the order and demanded possession of the business. The same was done in the case at bar. The parties served, one of whom was the president of the corporation for which a receiver had been appointed *ex parte,* claimed title, ownership and the right of possession of the business which the receiver demanded as against the corporation and receiver. The same is true in this case. The receiver in the *Oswald* case was expelled from the premises with force and violence. In our case the receiver was expelled but without force or violence.

There can be no doubt as to there being an adverse claimant in possession.

The appellant, Chas. W. Fourl, represented John M. Eustace, the adverse claimant, and was authorized to do whatever was necessary to protect his rights [p. 97].

This evidence is uncontradicted. The evidence shows [p. 99] that appellant Fourl informed the receiver of the filed certificate of fictitious name of the "Eustace Plumbing Company" in the name of John M. Eustace and that said individual had been in such business for thirty-five years. The receiver's representative at the other store read to the receiver the said certificate of fictitious name [p. 99]. The appellant Fourl at closing time said to the receiver Lynch: "Now you can't remain here, Mr. Lynch. This is the place of business of John M. Eustace and the court never authorized you or anybody else to take possession of property other than the property of the alleged bankrupt in the case, Katie M. Eustace" [p. 99]. The receiver said that if Fourl would place his hand on him, he (the receiver) would accompany him out. This was done, and the receiver and all parties departed [p. 100].

It was therefore evident that the property was adversely claimed by John M. Eustace and was in his possession, and that the said Katie M. Eustace made no claim of title or ownership in the property sought to be taken by the receiver and had no possession thereof. Since no particular property was described in the order other than by reference to the *ownership* by Katie M. Eustice, the receiver was not authorized to take possession of the property involved herein, claimed by John M. Eustace. The receiver was a trespasser and, as decided in the *Oswald* case, the appellant Fourl was justified in ordering the receiver from the premises.

There was no intent to defy the order of the court, but only a refusal to allow appellee to take charge of the property of John M. Eustace, which was not required under the terms of the said order.

B. Burden of Proof.

The decision of the Circuit Court in the *Oswald* case is based largely on the total failure of the government to sustain the burden of proving that the property in question did in fact belong to the "corporation."

We feel that there has been a like failure in the case at bar on the part of appellee to sustain a like burden of proof and that for that reason, among others, the conviction must be reversed because not only is there a total failure to show any ownership in Katie M. Eustace, but the petition for the order to show cause in re contempt [p. 16] does not even allege any ownership by Katie M. Eustace of the business or even that she was in possession thereof. There is a lack of both allegation and proof. Proof of possession by the alleged bankrupt was sought to be shown by a conversation between the receiver and a workman whom the receiver found on the premises alone at the time he came to the shop. Hearsay statements of Stevenson, a workman, as to possession or ownership are not only not admissible but they are not proof of the fact itself.

While such hearsay statements of Stevenson were testified to in the *Eustace* case, over objection [p. 41], and not

being evidence, the case is in the same condition as if such statements had never been made. There is no evidence in the case to support the proposition that the alleged bankrupt was in possession or owned the Eustace Plumbing Company.

The receiver said he knew nothing of the capacity in which Stevenson was acting there, or was employed there, other than what he told him [p. 67]. This made it clear that the receiver's testimony as to his conversation with Stevenson was not proof of such fact.

As to appellant Fourl, the said Stevenson never testified at all. Hence the only testimony as to this possession or ownership by any one is that of the receiver. This testimony covered only the conversation heretofore referred to with said Stevenson. This being merely hearsay, and not being admissible against appellant Fourl, there is no showing of any character whereby to bind said Fourl with any statements of Stevenson and the cause stands as to him without a vestige of testimony as to possession or ownership by Katie M. Eustace.

In view of the court's ruling in *In re McIntosh,* 73 Fed. (2d) 908, and the *Oswald* case, heretofore referred to, that the burden of proving guilt beyond a reasonable doubt in a criminal contempt case lies with the prosecution, (See also *U. S. v. Jose,* 951, 954, C. C. A. Wash.), and this includes a criminal intent upon the part of defendants, we respectfully submit that the burden of proof was not sustained, and particularly as to the criminal intent and defendants are entitled to a reversal.

POINT IV.

The Proceedings Were Fatally Defective Because the Pleadings Did Not State Jurisdictional Facts; the Order Based Thereon Is Void and Unenforcible.

We here note assignments of error numbered I and XII which read: (I) The court erred in overruling the motion of Chas. W. Fourl to dismiss the petition and order to show cause in re contempt and restoration of possession [p. 140]. (XII) The court erred in finding Chas. W. Fourl guilty of criminal contempt—on proceedings founded upon an affidavit and an order to show cause which are not sufficient in form or substance to warrant a proceeding in criminal contempt [p. 142]. See Exception No. 2 [p. 49].

Not only is the petition in re contempt and the order to show cause fatally defective and wanting in essential averments, but the involuntary petition itself is fatally defective. We will take up each pleading separately.

A. The Involuntary Petition Is Fatally Defective.

The involuntary petition in this cause [Tr. pp. 6-8] is fatally defective because it does not state a cause within the bankruptcy act. It does not allege insolvency when the judgments referred to in paragraphs 2 and 3 were procured. It does recite that "while insolvent," the bankrupt suffered and permitted the Oil Tool Exchange, Inc., to obtain through legal proceedings a judgment lien on real estate belonging to and standing in the name of the alleged bankrupt." Petitioner covered the words of the statute, but it is too well settled to need citation of

authority that an allegation of insolvency is not an allegation of fact. The petition must allege the debts and amount of assets in order to show insolvency. Otherwise the allegation is a mere conclusion. In this case it is even worse than a mere conclusion. Moreover, it does not state against whom the judgment was recovered. As to the second act of bankruptcy [p. 8] the petition does not show that Fourl or Harris (to whom the transfers were alleged to have been made), were creditors of said alleged bankrupt, nor does it allege there was an intent to prefer such creditor or creditors over other creditors as required by the bankruptcy act. As to the third act of bankruptcy alleged [p. 8], the allegation is that the alleged bankrupt while insolvent, caused to be transferred and concealed in the name of one G. Dibetta certain real estate situated at Huntington Beach, Cal. There is an entire absence of any allegation whose real estate this was. It is not alleged it was her real estate. It might just as consistently be the real estate of some other person as real estate belonging to the alleged bankrupt. She may for all intents and purposes have been representing some one else when said transaction occurred.

In *In re Sig. H. Roselblatt & Co.,* 193 Fed. 638 (C. C. A.), it was held that:

A general averment in an involuntary petition in bankruptcy that the alleged bankrupt within four months preceding the date of the filing of the petition committed an act of bankruptcy, in that, while insolvent, he transferred a part of this property to creditors with intent to prefer them, and transferred and concealed large sums of money and available securities, with intent to defraud his credi-

tors, and that the concealment was a continuous one, is too vague, and the petition is properly dismissed on demurrer.

To the same effect is

In re Carasaljo Hotel Co., 8 Fed. (2d) 469;

Matter of Moscovitz, Bankrupt, A. B. R. (N. S.) 6, 163.

It thus appears that there is no act of bankruptcy alleged. The petition is fatally defective and does not warrant the granting of any relief. We have collected under the following sub-heading numerous authorities on the subject of pleading which are applicable to both subpoints.

B. The Petition Seeking Appointment of Receiver is Fatally Defective.

Both the Bankruptcy Act, subd. 3, section 2, and the cases hold that: A receiver can only be appointed when *facts are stated showing that the appointment is absolutely necessary for the preservation of the estate.*

Bankruptcy Act, subd. 3, sec. 2;

Bryan v. Bernheimer, 18 U. S. 188;

Faulk v. Steiner, 165 Fed. 861;

In re Oakland Lumber Company, 174 Fed. 634.

And is limited by the act itself.

Boonville Natl. Bk. v. Blakey, 107 Fed. 891 (C. C. A. Ind.).

In *In re Hargadine-McKittrick Dry Goods Co.,* 239 Fed. 160, the court said:

> "Where the appointment of a receiver in bankruptcy is sought, it is not enough to allege the necessity for the appointment in the language of the statute, but *the moving papers must set forth the specific facts which reasonably establish such necessity.*" (Italics ours.)

In *Faulk v. Steiner,* 165 Fed. 861, the court said with respect to receivers in bankruptcy as follows:

> "The authority to make the appointment is conferred and limited by the act. There is but one ground stated for the appointment. The act authorizes the appointment of receivers 'upon the application of parties in interest in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.' *The petition to appoint the receiver should allege that the appointment is absolutely necessary for the preservation of the estate, and the facts should be stated, either in the sworn petition or in accompanying affidavits showing the necessity.*" (Italics ours.)

A petition much stronger than the one at bar was considered and held to be insufficient in that case. It is to be noted that the appointment in the case at bar was on the petition alone, without any accompanying affidavit—without any proof of facts [p. 13].

Again, the Second Circuit Court of Appeals in *In re Oakland Lumber Company,* 174 Fed. 634, said:

> "The power to take from a man his property is both arbitrary and drastic and should not be exercised except in the clearest cases. Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is absolutely necessary —after the filing of the petition and until it is dismissed or the trustee qualified—but fraud cannot be presumed * * * In no case should a remedy so far reaching in its effects be resorted to except upon clear and convincing proof * * * All these reasons combine in requiring that the power to appoint receivers should be exercised, not as a matter of course, but cautiously, circumspectly and always upon proof that the appointment is 'absolutely necessary.' The court has *jurisdiction under the statute to appoint receivers only when the papers on the application make a clear case.*" (Italics ours.)

Especially is this true when the application is without notice to the bankrupt. Under the well established rules a chancellor will not appoint a receiver without notice except in a case of imperious necessity, when the rights of the petitioner can be secured and protected in no other way.

As said in *Faulk v. Steiner,* 165 Fed. 861 (C. C. A. Ala.), *ibid:*

> "No principle is more essential to the administration of justice, whether by referee or a judge, than that no man should be deprived of his property without notice and opportunity to make his defense. A mistaken notion seems to have grown up in reference to bankruptcy proceedings that they are an exception to this principle."

The petition in that case was found defective because it did not state facts sufficient to authorize the appointment of a receiver without notice in an involuntary proceeding upon the petition alone. Allegations of the necessity, such as absconding, absence of bankrupt beyond jurisdiction, or imminent danger of irreparable injury, were held to be jurisdictional where a receiver is appointed without notice before adjudication.

The order of appointment herein [p. 13] recites it is made on *verified petition* duly filed, and it satisfactorily appearing *therefrom* that it is absolutely necessary, etc., to appoint a receiver. This, it will be noted, does not connote a finding of fact but merely recites the facts upon which the court determined the absolute necessity. The words of the act are not merely *necessity,* but *absolute* necessity. Does the petition allege such absolute necessity, as required by the act?

The necessity herein is alleged to arise for the following reasons:

(1) That said bankrupt plans and intends to dispose of and conceal a stock of plumbing supplies so as to avoid her creditors from securing the benefit of the same as assets of the estate; (2) that she has from some time been concealing in the names of dummies *other* real and personal property [p. 11]; that the value of her business and property is about $10,000.00 [p. 11].

Are the foregoing allegations of facts?

The allegation is "that Katie M. Eustace *has for a long time past been* engaged in the plumbing business." It is not alleged that she *is now* so engaged. It is alleged "that said alleged bankrupt *has been* the manager and

operator of said business." It is not alleged that she *is now* such manager and operator. It is alleged that "said bankrupt plans and intends to dispose of and conceal such stock of plumbing supplies," etc. This is clearly nothing but the conclusion of the pleader, for no person can allege with certainty what anyone plans and intends to do. No facts are alleged from which such a conclusion might be drawn. It is alleged that "said bankrupt * * * has for some time past been concealing in the names of dummies other real and personal property."

This is not a statement of fact, it is a conclusion only. Not a single transfer to any person is alleged. Moreover, it is an immaterial averment and does not show necessity, for if the alleged bankrupt has sufficient other property to pay her debts, her purpose in doing so is immaterial.

There is no allegation that she did not have sufficient property to satisfy her creditors otherwise than that so transferred. When we read the petition for the appointment of the receiver in connection with the allegations of the involuntary petition, as we must, the total failure of jurisdictional facts most strongly appears. The involuntary petition shows three claims only, as follows [p. 7]:

Oil Tool Exchange, Inc.	$6284.02
Speirs & Meadows	650.00
A. M. Kupfer	49.95

This represents a total of $6983.97 in claims. The petition on which the receiver was appointed alleged the value of the business and property to be the sum of $10,000.00 [p. 11]. Thus the petition on its face shows the alleged bankrupt solvent with an excess of assets over liabilities.

This is especially pertinent in view of the lack of allegations of insolvency or the existence of other creditors.

We submit that there is nothing in the entire petition which could authorize or justify a court in exercising the most extraordinary power of appointing a receiver, especially *ex parte,* without notice.

In this case we find a creditor having a claim less than fifty dollars, on a five hundred dollar bond, taking possession of a going business with assets as the petition alleges [p. 15] of ten thousand dollars without notice to the bankrupt or any other person, and taking as we claim, a business of a third party, the bankrupt's husband, which he had conducted for some years.

Since the petition for the appointment does not show the *absolute necessity* required by the statute, and the order itself showing it was made on said petition alone, the record falls short *both in averment and proof* of showing the necessity required. Neither the petition, the order of appointment nor any other part of the record show that the appointment was absolutely necessary for the preservation of the estate, and especially without any notice.

Since both the involuntary petition and the petition for appointment of receiver are fatally defective in their jurisdictional facts, the *order of appointment is void* and of no force or effect and the appellant cannot be held in contempt of court.

C. The Order to Show Cause in Re Contempt Was Likewise Fatally Defective. [Tr. p. 20.]

The acts complained of were not done in the immediate view of the court. It was therefore a constructive contempt, if anything. Ordinarily an affidavit of facts constituting the contempt must be presented to the court, which affidavit must show on its face a case of contempt, and if it does not the court has no jurisdiction and the order of contempt is void.

Overend v. Sup. Ct., 131 Cal. 280, 284;
Frowley v. Sup. Ct., 158 Cal. 220;
Fletcher v. Dist. Ct. Appeal, 191 Cal. 711.

Such affidavit must show a criminal intent and in the absence of such allegation is fatally defective and subsequent proceedings are absolutely void.

Hutton v. Sup. Ct., 147 Cal. 156.

In this case there was no affidavit of facts or moving papers serving as such. These proceedings were instituted by a petition of the receiver seeking to recover possession of said business, for an injunction to restrain interference with his possession and to declare defendants to be in contempt. The fatal condition of this pleading has already been shown.

There was no affidavit or moving papers in this case other than an order to show cause [p. 20]. This defect is jurisdictional. If the papers fail to contain facts constituting contempt the defect is jurisdictional.

Berger v. Sup. Ct., 175 Cal. 719, 15 A. L. R. 373;
Strain v. Superior Court, 168 Cal. 216, Ann. Case, 1915 D. 702;
Phillips Sheet, etc. Co. v. Amalgamated, etc. Workers, 208 Fed. 335.

Such defects cannot be cured by proof on the hearing.

Frowley v. Superior Court, 158 Cal. 220.

The order to show cause in re contempt against appellants while directed to Katie M. Eustace and Chas. W. Fourl [p. 20] *and service of which was shortened to one day* [p. 20] *does not show any facts whatever.* There was no order to serve the *petition* for the order [p. 16] on the respondents, nor does the record show such service [p. 16]. As a proceeding in a civil cause to require restoration of possession of the premises and an application for an order restraining interference therewith, this might be considered sufficient. But as a criminal or quasi-criminal proceeding in which it is sought to punish respondents by fine or imprisonment, another condition exists.

As a criminal proceeding the respondents are entitled to know what they will be compelled to meet. There must be both allegation and proof of the facts constituting the charge complained of.

Anargyros v. Anargyros, 191 Fed. 208, 210;

Sone v. Aluminum Castings Co., 214 Fed. 936, 131 C. C. A. 232;

Frowley v. Superior Court, 158 Cal. 220, 110 Pac. 817.

and in such form that the accused may know that the judgment sought against him is one of a punitory character,—that it is intended to punish him by fine or imprisonment.

Anargyros v. Anargyros, 191 Fed. 208.

The California cases are to the same effect:

> "An affidavit on which constructive contempt proceedings are based *must show on its face* the acts constituting the contempt, since the affidavit constitutes the complaint, and, unless it states facts showing that a contempt has been committed, the court is *without jurisdiction* to proceed, and any judgment based thereon is void."
>
> *Frowley v. Superior Court,* 158 Cal. 220, 110 P. 817;
>
> *Mitchell v. Superior Court,* 163 Cal. 423, 125 P. 1061;
>
> *Strain v. Superior Ct.,* 168 Cal. 216, 142 Pac. 62; Ann Cas. 1915D 702.

> "Proceedings in contempt being of a criminal nature, no intendments or presumptions are indulged in aid of the complaint."
>
> *Frawley v. Superior Court,* 158 Cal. 220.

These decisions are all in harmony with the decisions of this court. As said in *Beauchamp v. U. S.*, 76 Fed. (2d) 663, 668, C. C. A. 9th:

> "In order that disobedience of this injunction order may constitute contempt, it is necessary that the order be valid. Disobedience of a void mandate, order, judgment or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt."
>
> When '* * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being

> without jurisdiction, is void, and the order punishing for the contempt, is equally void * * *' Ex parte Fish, 113 U. S. 713, 5 S. Ct. 724, 726; 28 L. Ed. 1117; Ex parte Terry, 128 U. S. 289, 95 S. Ct. 77, 32 L. Ed. 405; In re Ayres, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216."

As to strangers to a suit, the cases do not require that the order be void, but only that it be unlawful.

In *Ex Parte Clark,* 126 Cal. 235, it was held no court or judge had power to punish as a contempt the violation or disregard of an unlawful order; and, where the court had made an unlawful order requiring the secretary of a corporation defendant to produce all of its books, in the absence of any showing that they contained evidence material to the plaintiff's cause, and where the secretary as a witness for the plaintiff had testified to the contrary, an order imprisoning him for contempt for violation of such unlawful order is void, and he is entitled to be released upon habeas corpus.

In *State ex rel Thornton-Thomas Mercantile Co., et al. v. Second Judicial District Court of Silver Bow County, et al.,* 20 Mont. 284, 50 Pac. 852, an order appointing a receiver was held to be void because the complaint failed to state facts sufficient to constitute a cause of action. The same complaint and the same order appointing a receiver came before the same court in *State ex rel Johnson v. Second Judicial Court, etc.,* 21 Mont. 155, 53 Pac. 272, 69 Am. S. R. 645, in proceedings to punish a stranger to the original proceedings for contempt for failure to obey an order of the court made in the original proceedings that the stranger turn over certain money to the receiver. The court there held:

> "Where a stranger to all parties to the original suit refused to turn over property to the receiver appointed in such suit and disobeys an order of court to turn over which the court had no authority in law to make, HE CANNOT BE GUILTY OF CONTEMPT."

See also:

State v. Burke, 163 Ill. 334, 45 N. E. 235;
People v. Weigley, 155 Ill. 491, 40 N. E. 300;
Leopold v. People, 140 Ill. 553, 30 N. E. 348;
Brown v. Moore, 61 Cal. 432;
People v. O'Neil, 47 Cal. 109;
Whitley v. Bank (Miss.), 15 South 33;
State v. Winder (Wash.), 44 Pac. 125.

If the order is void there can be no question.

In *Anderson v. Robinson,* 63 Ore. 228, 126 Pac. 988, a receiver was appointed ex parte without notice. There was no statute requiring notice but the Supreme Court held the appointment void because, when such appointment was made, *there was no proof of facts* before the court. The court further held such defect jurisdictional. The court there said:

> *"If the court is without jurisdiction to appoint a receiver, the order is void, and may be attacked or disregarded."*

As pointed out heretofore the receivership order could not authorize the receiver to take possession of the property of third persons claiming adversely under a bona fide claim of ownership as in this case. As said in *Bardes v. Hawaideen Bank,* 178 U. S. 524, 538:

> "The powers conferred on the courts of bankruptcy by clause 2, sec. 67, after the filing of the petition in bankruptcy in case it is necessary for the preservation of property of the bankrupt, *can hardly be considered as authorizing the forcible seizure of such property in the hands of an adverse claimant.*"

We feel that it should be readily apparent that the order appointing appellee a receiver was unlawful and void. Under the above authorities the court had no jurisdiction to appoint him ex parte on the basis of an involuntary petition in bankruptcy and a petition for appointment of receiver. Both of which failed to state any jurisdictional facts where it was granted on the petition alone without any showing of facts which could justify such appointment. Since the order was unlawful and void, there was no contempt in resisting its unwarranted enforcement.

POINT V.

A. Errors in Admission of Testimony.

The first hearsay declaration we wish to direct the court's attention to occurs on page 52 of the transcript wherein the receiver Lynch testifies over objection and exception taken [Exception 4, p. 53] as to a conversation with a workman Stevenson at the place of business of the Eustace Plumbing Company, and gives the content of this testimony [pp. 52-54]. Said Lynch testified that said Stevenson was working on a grinding machine, and he asked him who was in charge, to which Stevenson replied: "I am the only one here so I guess I am in charge," and in reply to a question as to where Mrs.

Eustace was, he said she usually arrived around 10 a. m. and that he said he had not seen Mr. Eustace for more than a year and in reply to a question as to who was the owner said, "well as far as I know Mrs. Eustace was."

On cross-examination said Lynch testified [p. 67]:

> "I knew nothing about the capacity in which Mr. Stevenson was acting there or was employed there other than what he told me. He was the only person there."

It is therefore, evident that this testimony was hearsay and should not have been admitted. Not only was it merely the recital of a conversation, which is not proof of the facts testified to, but the conversation not being with respect to a transaction then depending *et dum fervet opus,* and with a workman whom it was not shown was representing either appellant, was inadmissible against either party; especially against appellant Fourl. Moreover, a workman could not be presumed to make any statement or conclusion which could be binding on either appellant.

Admissions or statements of a witness not made within the scope of his employment and not made in regard to a transaction then depending *et dum fervet opus* were inadmissible.

> *Fidelity & Casualty Co. v. Haines,* 111 Fed. 337;
> *Goddard v. Frefield Mills,* 75 Fed. 818.

This evidence is extremely important and undue emphasis was placed thereon by the court. Thus, while the witness Lynch was being cross-examined by appellant Fourl's attorney upon matters he contended showed there

was no basis whatever for the claim that Katie M. Eustace was in possession of the property, the court made this statement [Tr. p. 64]:

> "Now the man inside said that he was employed by her, acting under her instructions."

The man inside was of course Stevenson.

Exceptions Nos. 4 and 5 was allowed to the admission of this testimony [p. 54]. There was no showing he was an employee, or agent of appellant Fourl, or anything else. Even an employee working on a piece of machinery cannot be said to be in possession and control of the business there conducted, nor the property there situated. Otherwise every employee of every store or factory, in the absence of the real owners, might be claimed to be in possession or control of the business of the owner. Such a position is preposterous.

The conversation between the Receiver Lynch and the said Stevenson in the absence of the defendants, heretofore referred to, could not bind the defendants or either of them, and was inadmissible, and is the only evidence upon which the court found possession in defendant Katie M. Eustace. Indeed, Stevenson's testimony [pp. 40-41] was introduced in the trial of the contempt proceeding of Katie M. Eustace, which was held a week or so prior to the hearing of the order to show cause against Fourl. In fact the court [p. 64] at the outset when the first witness against said Chas. W. Fourl was being examined, made a resumè of the testimony of one Stevenson, who testified at the *previous hearing* of Katie M. Eustace to the effect that the man inside said that he was employed by said Katie M. Eustace and acting under her instruc-

tions [p. 64]. The court even stated he was making a statement of evidence developed at the *previous hearing,* at which said Chas. W. Fourl was not represented, as the court well knew [p. 65]. Exception No. IX covers this. Yet we find the order on contempt as to Chas. W. Fourl [p. 130] reciting the evidence of Stevenson, who was never sworn or testified as a witness in the contempt hearing of Chas. W. Fourl [pp. 46-120]. The court found said Katie M. Eustace [p. 130] to be in possession at the time the receiver came there although she was not there, upon said hearsay testimony and upon testimony never produced in the Fourl hearing. This recital [pp. 129-133] of these hearsay statements shows the error was material and prejudicial and affected the court in arriving at its judgment.

Again the court allowed one Geo. Dyer to relate certain conversations with one John Eustace, Jr. [pp. 86-87], concerning contents of the books of the Eustace Plumbing Company, kept by one Griffith, whether an account was kept for John M. Eustace, over objection that the admissions or statements of an agent are not competent evidence except when made within the scope of his employment during the performance of his duty [p. 86]. Neither John Eustace, Jr., nor Griffith were employees of appellant Fourl or appellant Katie M. Eustace. No foundation was made to show this. It was hearsay and the books themselves were the best evidence. [Exception No. XVIII, p. 87.]

B. Errors in Rejection of Evidence.

This point is more fully stated by quoting assignments of error numbered XI and XIX [p. 142] reads as follows:

> "The court erred in the admission and rejection of evidence in this that the court rejected the proofs offered by Chas. W. Fourl with respect to the marital status of the alleged bankrupt and with respect to the ownership of the property concerning which these proceedings were instituted."

Assignment numbered XIX is a somewhat more detailed statement of the thought:

> "The court erred in sustaining objection to appellant's offer to prove that the plumbing business, concerning which the alleged contempt was committed, had been owned and operated by John M. Eustace, husband of Katie M. Eustace, prior to their marriage in 1904 and continuously ever since, and that she merely assisted him in it and had never put any money in it or acquired any right in it except a community interest; that Katie M. Eustace was never a sole trader nor qualified or licensed as a Master plumber, and that the license for conducting the plumbing business at 1246 East Ninth Street was and is held by John M. Eustace."

Defendants offered to prove by various witnesses [pp. 90-92] that the defendant Katie M. Eustace is and since 1904 has been the wife of John M. Eustace, and that said John M. Eustace before and ever since his marriage owned and conducted the business known as the Eustace Plumbing Company, and that the defendant at no time had any interest in the said business; that said wife had

no certificate of qualification as a master plumber, which was prerequisite to engaging in such business under the city ordinance of Los Angeles where the business was conducted; that a certificate of fictitious name had been filed by said John M. Eustace to the effect that he was doing business as the Eustace Plumbing Company; and that Katie M. Eustace had never taken any proceedings as required by sections 1811-12, C. C. P., of the state of California to enable her as a married woman to become sole trader [p. 90].

The witnesses were not examined by question because the court excused us from doing this [p. 92]. This testimony was rejected on the ground of immateriality and irrelevancy [p. 92] and this we feel was prejudicial error affecting one of the vital questions involved in this case.

The court indicated he was not interested in ownership of the property involved, only in possession [p. 92].

When the order of appointment of the receiver was made by the court, which is the measure of authority of said receiver [p. 14], it required all persons, including the bankrupt, to deliver to and turn over to such receiver all property *"in the possesion of them or any of them, and owned by said bankrupt and such bankrupt is ordered forthwith to deliver to said receiver all and any such property now in the possession of said bankrupt."* [p. 14.]

It will be noticed that *possession plus ownership* by the bankrupt was the factor determining whether the receiver was to take possession of the property. Even the bankrupt was only required to turn *such* property over to the receiver. Property the bankrupt did not own was not required to be delivered over to the receiver.

This proffered evidence tended to show who was in possession of the premises at the time of the alleged receivership. It was one of the physical facts to be considered in connection with the business. The receiver [p. 52] had testified, over objection, to conversations he had with one Stevenson, a workman, in the absence of appellants as to whether Mrs. Eustace was the owner of the business and the reply of the workman: "well, as far as I know Mrs. Eustace is the owner." [pp. 41, 53.] On cross-examination Stevenson said he did not know of his own knowledge who owned the business, and that if said receiver had asked him if John M. Eustace owned the business he would have said yes as far as he knew [p. 41].

Yet, while admitting such testimony as to ownership, over objection, when presented by the receiver, the court refused to admit evidence documentary and verbal of ownership to overcome such statement of Stevenson. The receiver regarded these questions to Stevenson as important, for we find this statement on page 67 of the transcript: "I was inquiring for Mrs. Eustace because I wanted to find out who was in possession, in control."

Certainly the facts offered to be proved, to-wit, ownership by John M. Eustace of the business, filing of certificate of fictitious name by him as Eustace Plumbing Company, relationship of alleged bankrupt as wife of John M. Eustace, inability under law for her to engage in plumbing business because of city ordinance requiring master plumber's certificate of qualification, and her inability to engage in business by reason of not having become a sole trader under the state law, all tended to negative the hearsay declarations of Stevenson, a workman, made in the

absence of appellants, and tended to negative ownership and possession in the alleged bankrupt and place it in that of John M. Eustace.

Furthermore, since under the law heretofore cited, the receiver was not and could not be authorized to or empowered to, take possession of the property of third persons in their possession and adversely claimed, it was proper to show that John M. Eustace was the owner of the business and in possession thereof, and not his wife, the alleged bankrupt.

It was admissible for another reason, for under the *Oswald* case, 71 Fed. (2d) 255, heretofore set forth in this brief, appellant was not required to deliver to the receiver property claimed by his client.

Exception No. 17 [p. 80] and Exception No. 19 [p. 93] are directed to the same question. The court would not allow argument on the subject [p. 80] and would not allow appellant to show conduct of the business by John M. Eustace for more than thirty years [p. 90], all tending to show possession and ownership.

In view of the foregoing and the court's attitude, as pointed out in the references above, this was vital testimony, affecting the substantial merits of the case and its rejection was prejudicial and could not help but affect the decision.

We need only refer to the orders in re contempt [pp. 129-131] and [p. 129] finding appellants guilty and giving certain relief. These findings are in the nature of findings of fact and conclusions of law but are really a resumè of the evidence. On page 130 of the transcript we find a resumè of the conversation of Stevenson and the

receiver, as well as the hearsay statements heretofore objected to. The court evidently based his decision thereon, as there is no other testimony even tending to support a possession or ownership by the alleged bankrupt. This order is dated and entered after the perfecting of the appeal as heretofore pointed out and entered *nunc pro tunc,* but if this is not a civil case such a finding of fact and conclusion of law has no place in the record. If a civil case, it was entered after appeal perfected, when the court's power over the case had ceased and is of no force or effect. However, it does show what the court had in mind when it made the rulings complained of. It shows clearly it was a vital factor in the decision.

Again it was prejudicial error to refuse the admission of testimony that the receiver had notice of the ownership by John M. Eustace of the business conducted under the name of Eustace Plumbing Company and that Katie M. Eustace had no interest therein [Exception No. 8, p. 60].

An offer was made to show that one Hiram E. Casey told the receiver before said receiver went to the place of business of the Eustace Plumbing Company that the alleged bankrupt had no interest therein and that same was not in the possession of the bankrupt [p. 60].

This is covered by assignment of error No. 21 [p. 144].

The reason the court gives is as follows:

> "The Court: Mr. Tuttle, the court expresses the opinion that if a Receiver or an officer of the Court were to be guided or affected by what counsel told him as to the facts in cases he would never get anywhere. I think that is evident to anybody. That

fact would mean nothing at all. The objection is sustained. The ruling has already been made, however."

We submit this was error as in connection with the other testimony as to possession and ownership excluded, it tended to show who was in possession. This being a vital question under the court's view it should have been received and its rejection was prejudicial error.

While the court may deem the rejection of any one of them was not sufficient to authorize a reversal, yet when considered in connection with the manner in which the case was conducted it indicates that the appellants did not have that fair and impartial trial to which they were entitled.

POINT VI.

The Proceedings Below Denied This Appellant the Due Process of Law Guaranteed by the United States Constitution.

The proceedings of the trial, as far as they refer to Chas W. Fourl, commence on page 46 of the transcript. All proceedings appearing in said transcript prior to page 46, to-wit, pages 36-46, are solely as to the trial of appellant Katie M. Eustace on Sept. 12.

On Sept. 19th service of the order to show cause on Chas. W. Fourl was accepted by Edward W. Tuttle as counsel for said Fourl [p. 47] and the cause was set for hearing at 12 o'clock noon two days later.

The verified answer of said Fourl was submitted at said time and the court asked to read it. The court refused to do so [p. 51], to which an exception was taken. An

interesting colloquy between counsel and court took place at said time [pp. 49-51], which we would respectfully ask this court to read. The court expressed the opinion that the only question involved was the *ostensible ownership,* that is, if it reasonably appeared that the alleged bankrupt was in charge of the business. He said "I expressed the opinion the other day that, from the evidence shown, that reasonably appeared to be the case. There was no question about that in my mind at all." [p. 50.] Evidently feeling his undue haste might not appeal to the reviewing court, he said:

> "Ultimately an upper court might find some fault with it, depending upon the distinction between a civil and criminal contempt, but this is the only court functioning today, of all four. Now don't take up any unnecessary time." [p. 50.]

Before even a word of testimony is heard the court, having forced appellant to trial on two days' notice, says there is only one point involved without even reading appellant's pleading, and says from the evidence "I have heard in another case there is no question in my mind as to that one." Appellant Fourl under such statement was in reality found guilty at the outset of the case. See Exception No. 3 [p. 51] and covered by Assignment of Error No. XX [p. 144].

The court refused to allow counsel for appellant to even make statements as to what he sought to show by a line of questioning [pp. 59-60], cutting him off and saying "That is enough, proceed." [p. 60.] On cross-examination of Receiver Lynch, who had testified as to conversations with Stevenson as to ownership and possession, he was asked as to knowledge in the course of his

business, of a former bankruptcy proceeding against John M. Eustace doing business as the Eustace Plumbing Company, in which no claim had been made by him at that time that Katie M. Eustace was the owner, and that there was no basis for the statement that Katie M. Eustace was in possession of the property in any sense of the term [pp. 63-64].

The court would not permit this [pp. 59-65] and after much discussion said [p. 64]:

> "The Court: Now, the man inside said that he was employed by her, acting under her instructions. The evidence shows that she was running the business, that is, she was paying the bills of the business. The money was in the name of another party altogether, who apparently had no interest at all in it, and she was paying the bills, and carried in her possession half a dozen signed checks. Now, gentlemen, I think you had better recognize the obvious here. Under such circumstances it would be a reproach, it seems to me, to a court, to say that people would forcibly or in any manner prevent a Receiver of this court from taking possession of the property. The Receiver wasn't going to eat the property; he wasn't going to destroy it. There is an orderly process for adjusting all these matters. You are at liberty, of course, to show the amount of force used, and all that sort of thing, but I simply ask all the counsel in this case, out of respect to the position that the court is in, the calendar here, to hurry this matter here and present it upon its merits, in other words, admit the facts. Here we are doing the same thing now that we did a few days ago, going over the same ground, which is made necessary—I will not say who is to blame for that. Proceed with the examination.

Mr. Tuttle: If the court please, I desire first to move to strike the statements of the court with respect to what the evidence shows here, other than such evidence as has been adduced on this hearing. Does the court grant the motion?

The Court: No, the court doesn't grant the motion. The court hasn't made any statement of evidence, other than what developed at the previous hearing.

Mr. Tuttle: That hearing we were not represented at.

The Court: No, I know you were not. Any further questions?

Mr. Tuttle: May I take an exception to Your Honor's ruling?

The Court: Yes. (Exception No. 9.)"

In addition, the court's remarks on page 69 of transcript are important to be considered:

"The Court: Now, Mr. Tuttle, you were here the other day, I believe, and you listened to the testimony.

Mr. Tuttle: If the court please, I am obliged to disagree with Your Honor. I was not present at the hearing.

The Court: Well, all right. We will not go into it. But when you say that you are rushed, I think your clients could have been here at that time, and not impose upon this court the necessary of threshing this straw over twice. I respectfully suggest to you that I don't think there is any rushing that has been done here. That I say in all candor and fairness. Have you any further questions?"

The man inside referred to was Stevenson, whom the receiver first met when he came to the place of business. He testified only in the Katie M. Eustace hearing [p. 40] and not in this cause, yet we find the court saying there was only one question involved and from what the witness had said in another case "there was no question about it in his mind" [p. 50] and we should recognize the obvious here as to this man's testimony [p. 64].

The court in effect determined the case before the first witness for the petitioner had completed his testimony upon evidence produced in another hearing, in which appellant was not represented and was not confronted with said witness or given an opportunity to cross-examine him.

This is not our conception of an Anglo Saxon trial, nor do we believe this court will so regard it. While a court sitting without a jury has more latitude in respect to trial than when the trial is by jury, nevertheless no court can deprive one of his constitutional right to be confronted with the witnesses and have an opportunity to cross-examine them under this guise.

We have shown by the foregoing resumè that this testimony of Stevenson was the vital testimony in the court's mind [p. 50] on the question of ostensible ownership. He refused to receive any testimony as to actual ownership and conduct of the business as we have pointed out under our points as to rejection of testimony. It is, therefore, apparent it determined the cause against appellants before we had an opportunity to be heard.

We have heretofore pointed out that the testimony of the witness Stevenson was the *sole* evidence upon which the District Court reached its conclusions as to ostensible

ownership—that without said evidence there is nothing in the record upon which any such finding as the court made could be predicated. That the court's ultimate action is based on such testimony clearly appears from the recitals of the *"nunc pro tunc"* order, dated Sept. 25, 1934 [p. 129, 130] wherein said testimony is set forth.

We have noted this error in our assignments IX and X:

> "(IX) The court erred in finding Chas. W. Fourl guilty of contempt upon evidence received and considered by the court from persons not under oath and not in the presence of the respondent, Chas. W. Fourl, to-wit, evidence taken at a hearing as to Katie E. Eustace on the same order but prior to service on, or appearance by appellant, at which hearing appellant was not present or represented, to the effect that Katie M. Eustace was running the plumbing business at 1246 E. Ninth St., paying the bills from money kept in the name of a stranger, and carried in her possession signed checks on such bank account."
>
> "(X) The court erred in finding Chas. W. Fourl guilty of contempt upon the evidence of witnesses with whom the said Chas. W. Fourl was not confronted and which witnesses he was not afforded an opportunity of cross-examining."

We shall not repeat here the authorities previously cited. Suffice it to say that such cases as

Boyd v. U. S., 116 U. S. 616;

Gompers v. Bucks Stove, etc. Co., ibid;

Wakefield v. Housel, et al., 288 Fed. 712,

most certainly hold a citizen is not deprived of his constitutional rights merely because a bankruptcy court seeks to dispose of matters before it with dispatch. As said in the *Gompers* case, a citizen charged with criminal contempt has certain rights:

1. He is presumed to be innocent;

2. He must be proved to be guilty beyond a reasonable doubt.

3. He cannot be compelled to testify against himself.

4. He is entitled to be confronted with and to cross-examine his accusers.

5. He is entitled to be heard in his own defense.

Accordingly we submit the foregoing shows that this court did not grant appellant a full and fair trial on the merits; that appellant was deprived by the court's conduct of an opportunity to examine and cross-examine witnesses; that appellant was convicted upon the testimony of witnesses never produced at his trial, whom he never had an opportunity to cross-examine; and that these unconstitutional errors constitute reversible error.

In view of the foregoing and the authorities cited we respectfully submit that the judgment should be reversed.

Respectfully submitted,

HIRAM E. CASEY,

Attorney for Appellant,

and

CHAS. W. FOURL,

In Propria Persona.

No. 7890

United States

Circuit Court of Appeals

For the Ninth Circuit.

WALTER BAER,

Appellant,

vs.

ROY J. NORENE, Divisional Director of Immigration, for the District of Oregon.

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

IRVIN GOODMAN,
Yeon Building, Portland, Oregon,
for Appellant.

CARL C. DONAUGH,
United States Attorney for the District of Oregon, and

HUGH L. BIGGS,
Assistant United States Attorney for the District of Oregon,
506 United States Court House,
Portland, Oregon,
for Appellee.

In the District Court of the United States for the District of Oregon.

L-12422

In the Matter of the Application of
WALTER BAER,

for a Writ of Habeas Corpus.

CITATION ON APPEAL.

United States of America.—ss.

The President of the United States of America, to:—

ROY J. NORENE, Divisional Director of Immigration and to CARL DONAUGH, United States Attorney for the District of Oregon, his Attorney; or HUGH L. BIGGS, Deputy United States Attorney herein:

YOU AND EACH OF YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, or at such other city as may be determined by said Court, within thirty (30) days from the date hereof, or such further time as may be allowed by said Court, pursuant to an order allowing an appeal of record in the Clerk's office of the United States District Court for the District of Oregon, wherein Walter Baer is appellant and you are appellee, to show

cause, if any there be, why the decree rendered against the said appellant as in the said order allowing the said appeal mentioned should not be corrected and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable James Alger Fee, United States District Judge for the District of Oregon, this 5th day of June 1935.

JAMES ALGER FEE,
United States District Judge.

Service accepted hereon this 5th June, 1935.

HUGH L. BIGGS,
Asst. U. S. Attorney.

A true copy of the original herein.

.....
Attorney for Appellant.

[Endorsed]: Filed Jun. 5, 1935. [1]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Oregon.

[Title of Court.]

March Term, 1935.

BE IT REMEMBERED, That on the 28th day of March, 1935, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Petition for Writ of Habeas Corpus in words and figures as follows, to-wit: [2]

[Title of Court and Cause.]

AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable J. Alger Fee and John McNary, Judges of said Court:

Your petitioner, Walter Baer, of the City of Portland, Multnomah County, State of Oregon, files this, his amended petition for writ of habeas corpus, and respectfully shows:

I.

That your petitioner is unlawfully imprisoned, detained and restrained of his liberty in said city, county and state by Roy J. Norene, Divisional Director of Immigration, under and by virtue of a warrant of arrest issued by the Department of Labor of the United States.

II.

That the cause or pretense for said imprisonment, detention and restraint is that your petitioner

"Has been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the commission subsequent to entry of a crime involving moral turpitude, to wit: Burglary in the second degree; Knowingly uttering a forged bank check; and Forgery of Endorsement."

III.

That your petitioner had a hearing upon said imprisonment, detention and restraint in said city, county and state before Roy J. Norene, Divisional Director of Immigration who, thereafter, recommended that your petitioner be deported from the United States and thereafter, said deportation was ordered by said Department of Labor. [3]

IV.

That your petitioner is illegally imprisoned, detained and restrained of his liberty in said city, county and state by said Roy J. Norene in violation of the fundamental principles that inhere in due process of law because said imprisonment, detention and restraint is not by virtue of any final order, process, or decree of any court and because said warrant of arrest and said hearing and said order of deportation are all illegal and void and that your petitioner should forthwith be restored to his liberty for the following reasons, to wit:

(a) That at said hearing before Roy J. Norene your petitioner, as the cause or pretense for said

imprisonment, detention and restraint of his liberty, was charged with having committed three crimes involving moral turpitude for which he served prison terms of one or more years each, to-wit: (1) the crime of burglary in the second degree in the State of Idaho nearly eighteen years ago (i. e. sentenced about June 26, 1917); (2) the crime of knowingly uttering a forged bank check in the State of Oregon nearly sixteen years ago (i. e. sentenced about November 17, 1919); (3) the crime of forgery by endorsement in the State of Oregon nearly fourteen years ago (i. e. sentenced about June 8, 1921);

(b) That on April 15, 1919, your petitioner was pardoned by the then Governor of the State of Idaho for commission of the crime of burglary in the second degree in said State in the year 1917;

(c) That, your petitioner verily believes, no substantial evidence was produced at said hearing before Roy J. Norene to sustain the deportation charge filed against your petitioner who said Roy J. Norene alleges entered the United States from Germany nearly twenty-eight years ago landing at New York on July 6, 1907 at the age of nine years;

(d) That, your petitioner verily believes, said alleged crimes of knowingly uttering a forged bank check and forgery by endorsement are not [4] crimes which the law, in such cases made and provided, terms crimes involving moral turpitude and,

pursuant to 8 U. S. C. A., Sec. 155 and the Court's interpretation thereof, your petitioner at no time committed crimes involving moral turpitude.

V.

That your petitioner is now thirty-seven (37) years old and has been a bona fide resident and inhabitant of the city of Portland, Multnomah County, State of Oregon, for many years prior to and at all times subsequent to his marriage on November 30, 1925, to Freda Volpp who was born at Willamette, Clackamas County, State of Oregon, and there are as issue of said marriage three little children who were born in said city of Portland and whose names and ages are as follows, to-wit: George, age eight; Lois, age six; Marlene, age three.

VI.

That except for a small amount of relief from the Multnomah County Public Welfare Bureau during the past two years while your petitioner had temporary employment your petitioner has at all times been, and he now is, the sole support of his said wife and three little children and the partial support of his aged and crippled father Ernest Baer who will be seventy years old on June 4, 1935.

VII.

That said alleged crimes date back from eight to four years prior to said marriage of your petitioner and at no time during the past fourteen years

has your petitioner been convicted of a crime, or even accused of the commission of a crime and, during the past fourteen years, your petitioner has faithfully performed his work as civil engineer holding responsible positions including employment for the United States Coast and Geodetic Survey, the City of Portland, the Title and Trust Company of Portland, Wallowa Law, Land and Abstract Company of Enterprise, Stevens and Koon consulting engineers of Portland and, further, in the year 1933 your petitioner was the [5] originator and designer of the plans and specifications and cost estimates filed with and accepted by the City Council of the city of Portland for a six million dollar sewage disposal plant which was subsequently voted upon at a special city election.

VIII.

That in addition to approximately fourteen years of faithful services performed by your petitioner as herein mentioned, your petitioner has served various terms in the Oregon National Guard and Third Oregon Regiment as follows:

1. In Company B, Oregon National Guard and honorably discharged.

2. In Company D, Oregon National Guard and honorably discharged.

3. In Battery A, Field Artillery Third Oregon and honorably discharged.

4. In Company D, Third Oregon and honorably discharged from service on Mexican border and final discharge reads "discharged account imprisonment by civil authority."

IX.

That your petitioner alleges, as a further ground for issuance of a writ of habeas corpus herein, that the Department of Labor of the United States and/or said Roy J. Norene, Divisional Director of Immigration, is estopped from proceeding against your petitioner upon the ground hereinbefore set forth for the following reasons:

(a) The lapse of time since the commission of said crimes and the release of your petitioner therefor and the institution of the within deportation proceedings;

(b) The destruction of your petitioner's family in the event of the deportation of your petitioner for the reason that your petitioner's wife and children, all being born in the State of Oregon and citizens of the United States, refuse to go to Germany and such destruction of your petitioner's [6] family is contrary to the purported purpose of the present administration of the Department of Labor of the United States.

WHEREFORE: Your petitioner prays the Court that a writ of habeas corpus may be granted and issued, directed to the said Roy J. Norene, Divisional Director of Immigration, in the city of Portland, Multnomah County, State of Oregon, commanding him to produce the body of your peti-

tioner before Your Honor at a time and place therein to be specified, then and there to receive and do what Your Honor shall order concerning the detention and restraint of your petitioner and that your petitioner be restored to his liberty.

(Verification over)

Petitioner. [7]

State of Oregon,
County of Multnomah—ss.

I, Walter Baer, being first duly sworn, depose and say that I am the petitioner in the within entitled cause and that the foregoing petition for writ of habeas corpus is true as I verily believe.

WALTER E. BAER

Subscribed and sworn to before me this 28th day of March, 1935.

[Seal] IRVIN GOODMAN
Notary Public for Oregon.
My commission expires Oct. 2, 1936.

Respectfully submitted,
IRVIN GOODMAN
Of Attorneys for Petitioner.

Due service of the within Amended Petition for Writ of Habeas Corpus, and the receipt of a duly certified copy thereof as required by law, is hereby accepted in Portland, Multnomah County, Oregon, this 28 day of March, 1935.

HUGH L. BIGGS
Ass't U. S. Attorney.

[Endorsed]: Filed March 28, 1935. [8]

AND AFTERWARDS, to wit, on the 29th day of March, 1935, there was duly filed in said Court, a Stipulation Relative to Answer to Amended Petition, in words and figures as follows, to wit:

[9]

[Title of Court and Cause.]

STIPULATION.

WHEREAS Amended Petition for Writ of Habeas Corpus was filed by petitioner on the 28th day of March, 1935, setting forth therein certain allegations in addition to those contained in the original Amended Petition, and

WHEREAS the issues are to be determined on the Amended Petition and Answer on the 29th day of March, 1935, and

WHEREAS there is not sufficient time for Respondent to prepare a formal Amended Answer denying the new matter alleged in the Amended Petition,

IT IS HEREBY STIPULATED by and between Irvin Goodman, of Counsel for the Petitioner, and Hugh L. Biggs, Assistant United States Attorney, Counsel for Respondent herein, that the new matter contained in said Amended Petition for Writ of Habeas Corpus, to-wit: Paragraph 4, Subsection "B" Lines 22 to 24, inclusive, and Paragraph 9 of said Amended Petition may be deemed by the Court to be denied by respondent as effectively as

if by formal verified amended answer.

Dated at Portland, Oregon, this 29 day of March, 1935.

IRVIN GOODMAN
Of Counsel for Petitioner
HUGH L. BIGGS
Assistant United States Attorney,
Counsel for Respondent herein.

[Endorsed]: Filed Mar. 29, 1935. [10]

AND, to wit, on Wednesday, the 27th day of February, 1935, the same being the 94th judicial day of the regular November term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [11]

[Title of Court and Cause.]

RULE TO SHOW CAUSE.

ON READING and filing the petition of Walter Baer, duly signed and verified by him, whereby it appears that he alleges he is illegally imprisoned and restrained of his liberty by Roy J. Norene, Divisional Director of Immigration in the City of Portland, Multnomah County, State of Oregon, and stating wherein the illegality consists,

IT IS HEREBY ordered that Roy J. Norene, said Divisional Director of Immigration, appear and show cause before this Court at the Courthouse thereof in said city of Portland on Thursday the 28th day of February, 1935, at 10:00 A. M. on said day, why a writ of habeas corpus should not be granted and issue, and said Walter Baer restored to his liberty, and to do and receive what shall then and there be considered concerning the said Walter Baer, together with the time and cause of his detention.

IT IS FURTHER ordered that service of this rule to show cause be forthwith made upon said Roy J. Norene.

Dated at Portland, Oregon, this 27th day of February, 1935.

JAMES ALGER FEE
Judge.

[Endorsed]: Filed February 27, 1935. [12]

AND AFTERWARDS, to wit, on the 8th day of March, 1935, there was duly filed in said Court, an Answer of Respondent, in words and figures as follows, to wit: [13]

[Title of Court and Cause.]

ANSWER AND RETURN TO RULE TO SHOW CAUSE.

COMES NOW Roy J. Norene, Respondent herein, appearing by Carl C. Donaugh, United States Attorney for the District of Oregon, and Hugh L. Biggs, Assistant United States Attorney, and for his return to the rule to show cause by what authority the petitioner herein, Walter Baer, is restrained of his liberty, which said rule was heretofore issued by this court on the 26th day of February, 1935, respectfully shows unto the court and alleges as follows, to-wit:

I.

That the respondent, Roy J. Norene, is now and for the past eighteen months has been Divisional Director of the Bureau of Immigration and Naturalization for the District of Oregon, under the Department of Labor of the United States, and during all the times herein mentioned was designated as Immigrant Inspector and performed all of the duties encumbent upon such official within the immigration district comprising the State of Oregon; that among the duties of said Inspector are the duties of enforcing the Acts of Congress

and laws of the United States pertaining to and having to do with the immigration and deportation of aliens resident of and found within the United States and particularly within the district comprising the State of Oregon, who are not legally entitled to be and remain in the United States for reasons propounded by law.

II.

That on the 29th day of March, 1934, the respondent, Roy J. Norene did receive from the Department of Labor a warrant for the arrest of your petitioner, issued to the District Director of Immigration and Naturalization, Seattle, Washington, under the hand of W. W. Husband, Second Assis- [14] tant Secretary of Labor, and under the seal of the Department of Labor, setting forth that the said petitioner was an alien in the United States, being a citizen of Germany; ~~that the said petitioner was an alien in the United States, being a citizen of Germany;~~ that the said petitioner entered the United States on the 6th day of July, 1907, and had remained continuously in this country since that date, and that he had been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the commission, subsequent to entry, of a crime involving moral turpitude, to-wit: burglary in the second degree, knowingly uttering a forged bank check, and forgery of endorsement;

That, pursuant to the statutes of the United States and the rules and regulations of the Department, said respondent, Roy J. Norene did arrest the said petitioner on the 9th of April, 1934, in execution of said warrant and did, on the same day, release the said petitioner under $500 bond; that in further execution of said warrant and in conformity with the terms thereof and the statutes in such cases made and provided, your respondent did thereupon fix the time for the hearing of the truth of the charges above-mentioned and enabling your petitioner to show cause why he should not be deported in conformity with the law as the 18th day of July, 1934, and did notify your petitioner of the time and place for said hearing.

That a copy of said warrant is marked Exhibit "A", attached hereto, and made a part hereof.

III.

That on the 18th day of July, 1934, a hearing was held by the said Roy J. Norene, as by law provided, at the respondent's office in the Federal Court House, Portland, Oregon, at which time and place your petitioner appeared in person and by counsel, Irvin Goodman and Harry L. Gross; that your petitioner was then and there informed that the purpose of said hearing was to afford your petitioner an opportunity to show [15] cause why he should not be deported to the country whence he came, said warrant being read and each and every allegation therein contained carefully explained;

that said warrant was then and there exhibited to your petitioner and each of his counsel for their scrutiny; that the respondent introduced various and sundry documentary evidence in support of the truth of the charges upon which said warrant was issued; that the hearing was continued until the 27th day of July, 1934, to be held in the same place; that at the continued hearing the petitioner appeared in person and by counsel, Harry L. Gross and Ernest Cole, and offered testimony in his own behalf;

That all of the proceedings had at the hearing and the continuance thereof were reduced to shorthand notes by Marjorie E. Kidd, a competent stenographer, and thereafter extended by typewriter, and the transcript of said notes certified to as being a true and correct transcript of the record of the hearing in said case by the said Marjorie E. Kidd, stenographer.

IV.

That said hearing was had for the purpose of determining whether the petitioner, Walter Baer, was in the United States in violation of the Immigration act of February 5, 1917, and subject to deportation on the ground that he had been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the commission, subsequent to entry, of a crime involving moral turpitude, to-wit: burglary in the second degree, knowingly uttering a forged bank check, and forgery of endorsement, and to enable

the said petitioner to show cause why he should not be deported in conformity with the law upon the grounds aforesaid, and was so instituted and conducted in all respects in conformity with the immigration rules of the United States Department of Labor; that said petitioner's counsel were given an opportunity to and did cross-examine witnesses testifying at the said hearing, were permitted to introduce evidence and given an opportunity [16] to show cause why he should not be deported, and for the purpose of showing that he had not violated the said Act of February 5, 1917;

That your respondent introduced documentary evidence establishing (1) Immigration to the United States by the petitioner, from Germany, on the 6th day of July, 1907; (2) Conviction of the crime of burglary in the second degree and a sentence of from one to five years in the Idaho State Penitentiary on the 26th day of June, 1917, in the County of Bear Lake, State of Idaho; (3) Conviction of the crime of knowingly uttering a forged bank check and sentence to imprisonment in the Oregon State Penitentiary for a term of not over four years on the 17th day of November 1919; (4) Conviction of the crime of forgery of an endorsement and sentence to a term of imprisonment in the Oregon State Penitentiary of not over four years on the 15th day of June, 1921; the last two convictions being in the Circuit Court for the District of Oregon for the County of Multnomah;

That the original record of said hearing and the exhibits therein received are hereby referred to and by reference incorporated herein to be presented and filed in court in this cause.

V.

That thereafter the complete record of said hearing granted the said petitioner was transmitted to the Commissioner of Immigration of the United States in conformity with the immigration laws of the United States, as aforesaid, and the rules and regulations promulgated thereunder, together with the recommendations of the District Director of Immigration, who was then and there in charge of the Immigration Office at Seattle, Washington, for the consideration and determination of the said Commissioner of Immigration and the Secretary of Labor as to whether or not a warrant for the deportation of said petitioner should issue. [17]

VI.

That thereafter, and on to-wit: the 9th day of November, 1934, after a consideration of the record in said proceeding and hearing for the deportation of the said petitioner, The Honorable Secretary of Labor found and decided that the petitioner, Walter Baer, was an alien found in the United States in violation of the Immigration Act of February 5, 1917, to-wit: That he had been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the com-

mission, subsequent to entry, of a crime involving moral turpitude, to-wit: burglary in the second degree, knowingly uttering a forged bank check, and forgery of endorsement, and thereupon issued a warrant for the deportation of the petitioner to the country from whence he came, to-wit: Germany, which said warrant was directed to the District Director of Immigration and Naturalization, Seattle, Washington, and the District Director of Immigration and Naturalization, Ellis Island, New York Harbor, and thereafter forwarded, for service upon petitioner, to the respondent herein, a true and correct copy of which warrant is hereto annexed, marked Exhibit "B" for identification and by reference incorporated into this pleading and made a part hereof as if in words and figures in this place fully set forth.

That said warrant of deportation contains the findings of the Secretary of Labor, and petitioner could have examined said warrant at respondent's office at any time, had he so requested.

VII.

That your respondent, Roy J. Norene, as Immigrant Inspector in the State and District of Oregon, by virtue of said office, is authorized to serve warrants of deportation, as such, upon and to arrest the persons therein named, and in execution of said warrant for the deportation of your petitioner the said Roy J. Norene, your respondent herein, acting in his official capacity, ordered and directed

the bondsmen of your petitioner to produce the petitioner for deportation to Germany; that the petitioner was surrendered to the respondent for deportation on the 20th day of February, 1935, and is now and ever since said 20th day of February, 1935, has been legally in custody [18] of your respondent, to be joined with the next deportation party leaving the District of Oregon for a port of embarkation, ~~and that the said warrant of deportation party leaving the District of Oregon for a port of embarkation,~~ and that the said warrant of deportation was and is the cause and authority of the said Roy J. Norene, respondent herein, for the imprisonment and detention of him, the said petitioner, as aforesaid.

VIII.

That petitioner, Walter Baer, is legally detained by reason of the proceedings aforesaid, and should be deported to Germany in accordance with the law and legal procedure respecting the case; that the said hearing was fair and impartial and properly and regularly conducted, as disclosed by the exhibits filed herein, and that the testimony duly and regularly transmitted was reasonably sufficient to satisfy, and did satisfy, the proper authorities as to the merits of the government's claim that the said petitioner should be deported in accordance with the Immigration Act of February 5, 1917, and rules and regulations promulgated thereunder.

WHEREFORE, the said Roy J. Norene, respondent herein, having fully answered the rule to show

cause why a writ of habeas corpus for the said Walter Baer should not be issued as prayed for in said petition of the said Walter Baer, prays that the rule to show cause, heretofore issued on the 25th day of February, 1935, be discharged; that the petition for writ of habeas corpus be dismissed, and that the petitioner, Walter Baer, be remanded to the custody of the said respondent for execution of the said warrant of deportation.

CARL C. DONAUGH
United States Attorney for the District of Oregon.
HUGH L. BIGGS
Assistant United States Attorney. [19]

United States of America,
District of Oregon.—ss.

I, Roy J. Norene, being first duly sworn, depose and say:

That I am now, and for the past eighteen months have been, Divisional Director of the Bureau of Immigration and Naturalization for the District of Oregon, and stationed at Portland, Oregon; that I have read the foregoing answer and return to the rule to show cause, issued by this Honorable Court on the 25th day of February, 1935, directed to myself, to show cause why a writ of habeas corpus should not issue, and know the facts therein

stated and contained, and that the same are true as I verily believe.

ROY J. NORENE.

Subscribed and sworn to before me this 6th day of March, 1935.

[Seal] HUGH L. BIGGS
Notary Public for Oregon.
My commission expires:
Sept. 17, 1935. [20]

EXHIBIT "A"

Warrant—Arrest of Alien

UNITED STATES OF AMERICA

Department of Labor
Washington

No. 81/820
No. 55860/11

To DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, Seattle, Washington, or to any Immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien WALTER BAER alias W. C. PAGET alias BEN KIRCHNER, who landed at the port of New York, N. Y., ex SS "Kaiserin Augusta Victoria", on the 6th day of July, 1907, has been found in the United States in violation of the immigration act of February 5, 1917, for the following among other reasons: That he has

been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the commission subsequent to entry of a crime involving moral turpitude, to wit: Burglary in the second degree; Knowingly uttering a forged bank check; and Forgery of Endorsement,

I, W. W. Husband, Second Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1934." Pending further proceedings, the alien may be released from custody under bond in the sum of $1000.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 29th day of March, 1934.

[Seal] W. W. HUSBAND
Second Assistant Secretary of Labor.

JFH [21]

EXHIBIT "B"

WARRANT—DEPORTATION OF ALIEN
UNITED STATES OF AMERICA

Department of Labor
Washington

No. 81/820
No. 55860/11

DISTRICT DIRECTOR OF IMMIGRATION and NATURALIZATION, Seattle, Washington.

To: DISTRICT DIRECTOR OF IMMIGRATION and NATURALIZATION, Ellis Island, N. Y. H. or to any officer or employee of the United States Immigration and Naturalization Service.

Whereas, from proofs submitted to me, Assistant to the Secretary, after due hearing before an authorized immigrant inspector, I have become satisfied that the alien WALTER ERNST BAER alias W. C. PAGET alias BEN KIRCHNER, who entered the United States at New York, N. Y., ex SS "Kaiserin Auguste Victoria", on the 6th day of July, 1907, is subject to deportation under section 19 of the Immigration Act of February 5, 1917, being subject thereto under the following provisions of the laws of the United States, to wit: The act of 1917 in that he has been sentenced, subsequent to May 1, 1917, to imprisonment more than once for a term of one year or more for the com-

mission subsequent to entry of a crime involving moral turpitude, to wit: burglary in the second degree, knowingly uttering a forged bank check, and forgery of endorsement,

I, Turner W. Battle, Assistant to the Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to deport the said alien to Germany, at the expense of the Appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1935", including the expenses of an attendant, if necessary. Delivery of the alien and acceptance for deportation will serve to cancel the outstanding appearance bond.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 9th day of November, 1934.

TURNER W. BATTLE
Assistant to the Secretary of Labor. [22]

United States of America,
District of Oregon.—ss.

Service of the within ANSWER AND RETURN TO RULE TO SHOW CAUSE is accepted in the State and District of Oregon, this 8th day of March 1935, by receiving a copy thereof, duly certified to as such by Hugh L. Biggs, Assistant United States Attorney for the District of Oregon.

IRVIN GOODMAN
Of Attorneys for Petitioner.

[Endorsed]: Filed March 8, 1935. [23]

AND AFTERWARDS, to wit, on Friday, the 29th day of March, 1935, the same being the 23rd judicial day of the regular March term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[24]

No. L-12422

In the Matter of the Application of
WALTER BAER
for a Writ of Habeas Corpus.

March 29, 1935.

Now at this day comes the petitioner by Mr. Irvin Goodman and Mr. Ernest Cole, of counsel, and the respondent Roy J. Norene, Divisional Director of Immigration, by Mr. Hugh L. Biggs, Assistant United States Attorney. Whereupon counsel for the respective parties hereto stipulate that the new matter in the amended petition herein be deemed denied by the respondent. Whereupon this cause comes on for hearing upon the amended petition for an order requiring the respondent to show cause why a writ of Habeas Corpus should not issue herein and the respondent's answer thereto; and the court having heard the evidence adduced and the arguments of counsel, and being now fully advised in the premises,

IT IS ORDERED that the said petition be and the same is hereby dismissed, and said application

for a Writ of Habeas Corpus is hereby denied; and

IT IS ORDERED that the petitioner be and he is hereby allowed thirty days from this date within which to initiate an appeal herein, and that bond on appeal be and the same is hereby fixed in the sum of $500.00. [25]

AND AFTERWARDS, to wit, on the 5th day of June, 1935, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit: [26]

[Title of Court and Cause.]

PETITION FOR APPEAL.

NOW COMES Walter E. Baer, the person in whose behalf the petition for writ of habeas corpus was filed in the above-entitled Court, and respectfully shows:

THAT on or about March 29, 1935, the above-entitled Court made and entered its order denying the petition for writ of habeas corpus as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of appellant herein, all of which will more fully appear from the assignment of errors filed herewith;

WHEREFORE, appellant prays that an appeal be granted in appellant's behalf to the Circuit

Court of Appeals for the United States for the Ninth Circuit thereof, for the correction of errors as complained of, and further that a transcript of the record, proceedings and papers in the above-entitled Court, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof, and further that said appellant be held within the jurisdiction of this Court during the pendency of the appeal herein so that he may be produced in execution of whatever judgment may be finally entered herein. Dated at Portland, Oregon, this 5th June, 1935.

IRVIN GOODMAN
Attorney for Appellant
1225 Yeon Bldg.,
Portland, Ore.
At 7494

Service accepted hereon this 5th June, 1935.
HUGH L. BIGGS
Ass't U. S. Attorney

[Endorsed]: Filed June 5, 1935. [27]

AND AFTERWARDS, to wit, on the 5th day of June, 1935, there was duly filed in said Court, an Assignment of Errors, in words and figures as follows, to wit: [28]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

NOW COMES WALTER BAER, the person in whose behalf the petition for writ of habeas corpus was filed in the above-entitled proceeding, through his attorney Irvin Goodman, and sets forth the errors he claims the above-entitled Court committed in denying the petition for writ of habeas corpus, as follows:

I.

THAT said Court erred in denying the writ of habeas corpus by holding that the following crimes are crimes involving moral turpitude within the meaning of the Immigration law, to-wit:

(a) Burglary in the second degree in the State of Idaho in the year 1917;

(b) Knowingly uttering a forged bank check in the State of Oregon in the year 1919;

(c) Forgery of endorsement in the State of Oregon in the year 1921;

WHEREFORE appellant prays that said order and judgment of the United States District Court for the District of Oregon, made, given and entered therein in the office of the Clerk of said Court on

the 29th March, 1935, denying the petition for writ of habeas corpus be reversed and that the said Walter Baer be restored to his liberty and go hence without delay. Dated at Portland, Oregon, this 5th June, 1935.

IRVIN GOODMAN
Attorney for Appellant.

Service accepted hereon this 5th June, 1935.
HUGH L. BIGGS
Ass't U. S. Attorney.

[Endorsed]: Filed June 5, 1935. [29]

AND AFTERWARDS, to wit, on Wednesday, the 5th day of June, 1935, the same being the 76th judicial day of the regular March term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [30]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

IT APPEARING to the above-entitled Court that Walter Baer, the person in whose behalf the petition herein was filed, has this day filed and presented to the above-entitled Court his petition praying for an order of this Court allowing an

appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and order of said Court denying writ of habeas corpus and dismissing his petition for said writ, and good cause appearing therefor,—

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and,

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled Court make and prepare a transcript of all papers, proceedings and records in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, within the time allowed by law and/or fixed by this Court; and,

IT IS HEREBY FURTHER ORDERED that execution of the warrant of deportation of said appellant be, and the same is hereby, stayed pending this appeal and that said appellant be not removed from the jurisdiction of this Court pending this appeal and that the present custody and control remain undisturbed pending this appeal. Dated at Portland, Oregon, this 5th June, 1935.

JAMES ALGER FEE
Judge of the aforesaid Court.

Service accepted hereon this 5th June, 1935.

HUGH L. BIGGS
Ass't U. S. Attorney.

[Endorsed]: Filed June 5, 1935. [31]

AND AFTERWARDS, to wit, on the 5th day of June, 1935, there was duly filed in said Court, a Stipulation of Facts in words and figures as follows, to wit: [32]

[Title of Court and Cause.]

STIPULATION

Appellant and Appellee, by their respective counsel herein, do hereby stipulate and agree upon the following Statement of Facts and upon the following Issue Presented Upon Appeal in the aforesaid matter:

STATEMENT OF FACTS

On March 29, 1934, Roy J. Norene, Appellee, received from the Department of Labor a warrant for the arrest of Appellant issued to the District Director of Immigration and Naturalization, Seattle, Washington, under the hand of W. W. Husband, Second Assistant Secretary of Labor, and under the seal of the Department of Labor, said warrant setting forth in substance that Appellant is an alien in the United States, being a citizen of Germany, and entered the United States on July 6, 1907 remaining continuously since said date and that Appellant, subsequent to May 1, 1917 had been sentenced to imprisonment more than once for a term of one year or more for the commission of a crime involving moral turpitude to-wit: burglary in the second degree, knowingly uttering a forged bank check, and forgery of endorsement.

That pursuant to the statutes of the United States and the rules and regulations of the Department, said Appellee did arrest Appellant on the 9th April, 1934, in execution of said warrant and did, on the same day, release the Appellant under $500 bond; that in further conformity with the terms thereof and the statutes in such cases made and provided, Appellee fixed the time for the hearing of the truth of the charges above-named and enabling Appellant to show cause why he should not be deported in conformity with the law, notifying Appellant thereof. [33]

That on July 18, 1934 and July 27, 1934, hearings were had by Appellee in the Federal Court House, Portland, Oregon, and at said hearings Appellant was represented by counsel, evidence was introduced, briefs submitted to the Department of Labor and, thereafter, the Department of Labor determined that Appellant should be deported to Germany.

That, thereafter, Appellant filed his Amended Petition for Writ of Habeas Corpus and Rule to Show Cause in the United States District Court for the District of Oregon to which Appellee filed his Answer and Return to Rule to Show Cause and on March 29, 1935 James Alger Fee, Judge of the aforesaid court, denied Appellant's said Amended Petition for Writ of Habeas Corpus whereupon this appeal is taken.

THE ISSUE.

Appellant and Appellee do hereby further stipulate and agree that Appellant, Walter Baer, was convicted for the commission of the three crimes hereinafter mentioned and, on each occasion, was imprisoned in the penitentiary for more than one year and, therefore, the only issue presented upon this appeal and to be determined by the Circuit Court of Appeals for the United States, Ninth Circuit, is whether or not the United States District Court for the District of Oregon erred in holding that the following crimes committed by Walter Baer are crimes involving moral turpitude within the meaning of the Immigration Law, to-wit:

(a) Burglary in the second degree in the State of Idaho in the year 1917, and sentenced to more than one year.

(b) Knowingly uttering a forged bank check in the State of Oregon in the year 1919 and sentenced to more than one year.

(c) Forgery of endorsement in the State of Oregon in the year 1921, and sentenced to more than one year.

IRVIN GOODMAN
Attorney for Appellant.
CARL DONAUGH,
U. S. Attorney, and
HUGH L. BIGGS,
Assist. U. S. Attorney.
By: HUGH L. BIGGS,
Attorneys for Appellee.

Dated June 5, 1935.

[Endorsed]: Filed June 5, 1935. [34]

AND AFTERWARDS, to wit, on the 5th day of June, 1935, there was duly filed in said Court, a Praecipe for Transcript in words and figures as follows, to wit: [35]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above-entitled Court:

Please prepare transcript on appeal to include:

(1) Amended petition for writ of habeas corpus.
(2) Rule to show cause.
(3) Answer and Return to Rule to Show Cause.
(4) Stipulation. Dated March 29, 1935.
(5) Order denying Petition.
(6) Notice of Appeal.
(7) Petition for Appeal.
(8) Assignment of Error.
(9) Order allowing appeal.
(10) Citation on appeal.
(11) Stipulation, dated June 5, 1935.
(12) Praecipe for Transcript of Record.

Dated at Portland, Oregon, June 5, 1935.

IRVIN GOODMAN
Attorney for Appellant.

Service accepted hereon this 5th day of June, 1935.

HUGH L. BIGGS
Assistant U. S. Attorney.

[Endorsed]: Filed June 5, 1935. [36]

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 2 to 36 inclusive, constitute the transcript of record upon the appeal from the judgment of said court, in a cause pending therein In the Matter of the Petition of Walter Baer for a Writ of Habeas Corpus, Walter Baer, Appellant and Roy J. Norene, Divisional Director of Immigration, Appellee; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and has been by me compared with the original thereof, and is a full true and complete transcript of the record and proceedings had in said Court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $6.15, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 7th day of June, 1935.

[Seal] G. H. Marsh, Clerk. [37]

[Endorsed]: No. 7890. United States Circuit Court of Appeals for the Ninth Circuit. Walter Baer, Appellant, vs. Roy J. Norene, Divisional Director of Immigration, for the District of Oregon, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 10, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7890

In the United States Circuit Court of Appeals

For the Ninth Circuit

WALTER BAER,

Appellant,

vs.

ROY J. NORENE, Divisional Director of Immigration, for the District of Oregon,

Appellee.

Brief for Appellant

Upon Appeal from the United States District Court for the District of Oregon.

IRVIN GOODMAN,
Yeon Building, Portland, Oregon, for Appellant.

CARL C. DONAUGH,
United States Attorney for the District of Oregon, and

HUGH L. BIGGS,
Assistant United States Attorney for the District of Oregon,
506 United States Court House, Portland, Oregon, for Appellee.

DEMPSEY, KINSEY & DOWNS, PRINTERS

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

No. 7890

In the United States Circuit Court of Appeals

For the Ninth Circuit

WALTER BAER,

Appellant,

vs.

ROY J. NORENE, Divisional Director of Immigration, for the District of Oregon,

Appellee.

Brief for Appellant

Upon Appeal from the United States District Court for the District of Oregon.

This appeal is taken from the order of the United States District Court for the District of Oregon dismissing appellant's petition for writ of habeas corpus.

STATEMENT OF CASE

Appellant, thirty-seven-year-old civil engineer, was arrested April 9, 1934, by Appellee, Divisional Director of Immigration for the District of Oregon, upon a warrant received from the Department of

Labor alleging that Appellant was a citizen of Germany, entered the United States July 6, 1907, remained continuously thereafter and, subsequent to May 1, 1917, had been imprisoned more than once for a term of one year or more for the commission of crimes involving moral turpitude, to-wit: burglary in the second degree in Idaho in 1917, and sentenced to more than one year; knowingly uttering a forged bank check in Oregon in 1919, and sentenced to more than one year; forgery of endorsement in the State of Oregon in 1921 and sentenced to more than one year. (Tr., pp. 33-4-5.)

Appellant, since his final release from prison in 1924, married and is the sole support of his young wife, born near Portland, of three little children, all born in Portland, whose ages are eight, five and three, and the partial support of his aged and crippled father of over seventy years. (Tr., p. 7.)

Appellant committed no crime since 1921 and the three crimes herein mentioned followed his extensive services as a youth in the Oregon National Guard and Third Oregon Regiment as follows:

1. In Company B, Oregon National Guard and honorably discharged.

2. In Company D, Oregon National Guard and honorably discharged.

3. In Battery A, Field Artillery, Third Oregon and honorably discharged.

4. In Company D, Third Oregon and honorably discharged from service on Mexican border and final discharge reads "discharged account imprisonment by civil authority." (Tr., pp. 8-9.)

The issue presented upon this appeal is whether or not the District Court erred in holding the three crimes herein mentioned involve moral turpitude within the meaning of the Immigration Law. (Tr., p. 35.)

SPECIFICATION OF ERRORS

Appellant contends the District Court erred in not granting the writ of habeas corpus and discharging Appellant from custody of Appellee by holding the three crimes herein mentioned involve moral turpitude within the meaning of the Immigration Law. (Tr., p. 30.)

BRIEF OF ARGUMENT

Appellant shall endeavor to present this Brief of Argument in an organized manner, considering the points and law relied upon in a chronological order:

POINT I.

THIS PROCEEDING IS BROUGHT UNDER UNITED STATES STATUTES AT LARGE (64th Congress), 1915-17, Vol. 39, Sec. 19, p. 889, which reads:

"except as hereinafter provided, any alien . . . who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . ."

POINT II.

THE COURTS IN DETERMINING WHETHER OR NOT A CRIME INVOLVES MORAL TURPITUDE MUST LOOK ONLY TO THE INHERENT NATURE OF THE CRIME OR TO THE FACTS CHARGED IN THE INDICTMENT AND THE GRAVITY OF PUNISHMENT IS NOT CONTROLLING.

In United States ex rel Zaffarano vs. Corsi, Commissioner of Immigration (C.C.A.) (63 Fed. (2nd) 757), Judges L. Hand, Swan and Augustus N. Hand, held: "We have heretofore held that, in determining whether the crime of which an alien stands convicted is one "involving moral turpitude," **neither the immigration officials nor the courts sitting in review of their action may go beyond the record of conviction. They must look only to the inherent nature of the crime or to the facts charged in the indictment upon which the alien was convicted, to find the moral turpitude requisite for deportation for this cause.** Since the indictment was not before the immigration officials they knew nothing as to the specific charge upon which the relator was convicted. It may have involved moral turpitude, or it may not. **The gravity of the punishment is not**

controlling . . . the crime committed must itself involve moral turpitude. Hence we think the record is insufficient to support the action of the immigration officials in ordering deportation. **This language means that neither the immigration officials nor the court reviewing their decision may go outside the record of conviction to determine whether in the particular instance the alien's conduct was immoral.** And by the record of conviction we mean the charge (indictment), plea, verdict and sentence. The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted. . . ."

POINT III.

THE INHERENT NATURE OF THE CRIMES OF (1) BURGLARY IN THE SECOND DEGREE IN IDAHO IN 1917; (2) KNOWINGLY UTTERING A FORGED BANK CHECK IN OREGON IN 1919; (3) FORGERY OF ENDORSEMENT IN OREGON IN 1919 MUST BE THE DETERMINING FACTOR IN THIS CASE SINCE APPELLEE DID NOT PRODUCE THE INDICTMENTS AND THEY ARE NO PART OF THE RECORD HEREIN.

(See authority under Point II.)

POINT IV.

WHAT ARE THE AFORESAID CRIMES, SO THAT THEIR INHERENT NATURE MAY BE DETERMINED? (Appellant shall omit from consideration the crime of Burglary in the Second Degree

in Idaho in 1917 because, Appellant contends, as alleged in Amended Petition for Writ of Habeas Corpus (Tr., p. 6), but not admitted by Appellee, that Appellant was pardoned for said crime, thus removing same from the Immgiration Law.)

> Oregon Code, 1930, Vol. 1, Sec. 14-379, Forgery or altering record, etc.: "If any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit any public record whatever, or any certificate, return, or attestation of any clerk, notary public, or other public officer, in relation to any matter wherein such certificate, return, or attestation may be received as legal evidence, or any note, certificate or other evidence of debt issued by any officer of this state, or any county, town, or other municipal or public corporation therein, authorized to issue the same, or any application to purchase state lands or assignment thereof, contract, charter, letters, patent, deed, lease, bill of sale, will, testament, bond, writing obligatory, undertaking, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, evidence of debt, or any acceptance of a bill of exchange, indorsement, or assignment of a promissory note, or any warrant, order, or check, or money, or other property, or any receipt for money or other property, or any acquittance or discharge for money or other property, or any plat, draft, or survey of land; or shall, with such intent, knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited record, writing, instrument, or matter

whatever, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two nor more than twenty years."

POINT V.

BUT IN DETERMINING THE INHERENT NATURE OF THE CRIMES OF KNOWINGLY UTTERING A FORGED BANK CHECK AND FORGERY OF ENDORSEMENT IS THE CRITERION OF JUDGMENT TO BE SOCIETY'S VIEWPOINT TOWARDS THOSE CRIMES IN THE YEARS 1919 AND 1921, WHEN COMMITTED, OR THE VIEWPOINT OF 1935, THE IMMIGRATION DEPARTMENT NOT HAVING INSTITUTED THE WITHIN DEPORTATION PROCEEDINGS UNTIL FOURTEEN YEARS AFTER COMMISSION OF THE LAST CRIME?

"Moral turpitude is a term which conforms to and is consonant with the state of the public morals; hence, it can never remain stationary."
North Dakota vs. Joe Malusky, Appt. (1930), 71 A. L. R., p. 190.

"What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases where no

other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted. But at the present day either stocks or whipping might be thought an infamous punishment." Justice Gray in Ex parte Wilson, 114 U. S., p. 417.

POINT VI.

APPELLANT CONTENDS THAT IF THE CRITERION OF JUDGMENT IS SOCIETY'S VIEWPOINT IN 1935 THEN, IN ANY EVENT, THE CRIMES OF KNOWINGLY UTTERING A FORGED BANK CHECK AND FORGERY OF ENDORSEMENT ARE OBVIOUSLY NOT CRIMES INVOLVING MORAL TURPITUDE BECAUSE SUCH CRIMES ARE ALMOST DAILY DISPOSED OF BY MUNICIPAL JUDGES AS CHECK VAGRANCY CHARGES AND THE CIRCUIT COURT OF APPEALS SHOULD TAKE JUDICIAL NOTICE OF THAT FACT.

POINT VII.

INDEED THE TERM MORAL TURPITUDE AS APPLIED TO THE IMMIGRATION ACT IS VAGUE, INDEFINITE, NOT SUSCEPTIBLE OF EXACT DEFINITION AND, IN 1926, CONGRESS EVEN DETERMINED TO DELETE THE PHRASE FROM THE IMMIGRATION ACT.

The Harvard Law Review, Vol. 43, (1929-30),

beginning on p.117, states: "Violation of the Volstead Act and petit larceny have recently been held to involve moral turpitude; manslaughter, violation of a state liquor law, and fornication were held not to. Such a patchwork of decisions brings again to the fore the meaning of the phrase, "Crimes involving moral turpitude," and invites examination of its content. . . . **"But it is in the Immigration Act that the phraseology seems most unfortunate.** Though proceedings under the act are not criminal, they are sufficiently severe in the application to be in their nature penal. **Men who are menaced with the loss of civil rights should know with certainty the possible grounds of forfeiture. And the loose terminology of moral turpitude hampers uniformity; it is anomalous that for the same offense a person should be deported or excluded in one circuit and not in another. But the weightiest objcetion is that the statute operates upon thousands to whom judicial review is denied by economic barriers. For them the final decision is to be made by lay administrators. It is hardly to be expected that words which baffle judges will be more easily interpreted by laymen; if power must be delegated, it should be clearly circumscribed."** . . . "The conclusion seems inevitable that in the classification of crimes it is perilous and idle to expect an indefinite statutory term to acquire precision by the judicial process of exclusion and inclusion. The legislature can ordinarily better accomplish its purpose by enumerating the proscribed offenses, or by dividing them on the basis of penalty imposed. Either

method would replace with a uniform standard the apocalyptic criteria of individual judges." . . . In footnotes, on p. 121, we find: "In 1926 the House Committee on Immigration and Naturalization determined to delete the phrase from the act. H. R. Rep. No. 69, 1, 3, 69th Congress, 1st Sess. at 3. But to date Congress has been unable to agree on changes in the wording." 70 Cong., Rec. 3533, 3547, 4951 (1929)."

POINT VIII.

SINCE EVEN MANSLAUGHTER HAS BEEN HELD BY THE FEDERAL COURT NOT TO BE A CRIME INVOLVING MORAL TURPITUDE, HOW CAN THIS COURT DETERMINE THAT CRIMES OF KNOWINGLY UTTERING A FORGED BANK CHECK AND FORGERY OF ENDORSEMENT COMMITTED BY A MERE YOUTH FOURTEEN AND MORE YEARS AGO INVOLVE MORAL TURPITUDE?

In the case of United States ex rel Mongievi vs. Karnuth, Dist. Dir. of Immi., 30 Fed. (2d) 825, the relator, who was discharged, entered the United States in 1913, and subsequently pleaded guilty to an indictment for manslaughter and sentenced to not less than six and one-half years and not more than fifteen years. The Court stated:

"It is now contended in his behalf that manslaughter in the second degree is not a crime involving moral turpitude, and therefore his deportation is illegal. Moral turpitude is defined as

"an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society." The intentional slaying of a human being, even though committed without malice, and manslaughter in the first degree, which apparently includes intent and willfulness, would therefore be offenses involving moral turpitude."

"This court is without power to examine into the evidence upon which the conviction or the relator's plea of guilty of manslaughter in the second degree was based (U. S., etc., vs. Uhl (D. C.), 203 F. 152) and accordingly resort must be had to the statutes of the state of New York to define the particular character of the crime. . . ."

"The Solicitor of the Department of Justice, not long since, in a definition of crimes involving moral turpitude for the information of immigration officers, specified a number of offenses which, in his judgment, involved moral turpitude, and excepted offenses which were "the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, or of mistaken principles, unaccompanied by a vicious motive or corrupt mind." **Although this general summary is vague and indefinite, yet I think that the commission of manslaughter in the second degree is "unaccompanied by a vicious motive or corrupt mind."**

"The instant case is quite different from Weedings Yamada (C. C. A.), 4 Fed. (2d) 455, and U. S. ex rel Norlacci vs. Smith, etc., 8 Fed (2d) 663, decided by this court, wherein it was ruled that, as the crime of assault with a deadly

weapon, as defined in the respective state statutes, was committed with an intent to do bodily harm, the offense involved moral turpitude. **The deportation of the relator would involve great hardship, inasmuch as he has lived in this country for the past ten years, and has dependent upon him, especially since his parole, his wife and two children born in Italy. If his testimony before the inspector is reliable, he has never been arrested or convicted of a crime, committed either in Italy or in this country, except the crime for which he was sentenced as herein stated. In an affidavit filed in this proceeding, he deposed that it was his daughter who accidentally suffered death at his hands in the course of a quarrel between him and his wife, wherein there was a struggle for possession of a pistol, which, during the struggle, was accidentally discharged. However, as heretofore pointed out, going beyond the record of conviction to ascertain the facts is not required, since the question of moral turpitude must be determined, as Judge Noyes said, in U. S., etc., vs. Uhl, supra, "According to the nature and not according to the facts and particular circumstances accompanying the commission of it."**

"So considered, the writ of habeas corpus, in my opinion, must be sustained, and the relator discharged from custody. So ordered."

POINT IX.

FINALLY APPELLANT SUBMITS THE FOLLOWING TWO CASES TO THE CIRCUIT COURT OF APPEALS FOR SERIOUS CONSIDERATION:

I.

In the case of Ex parte Saraceno (Circuit Court, S. D., New York (1910), 182 Fed. p. 955, one Pasquale Saraceno applied for a writ of habeas corpus to obtain discharge from custody under the deportation law. The Court, granting the writ, stated:

> "Pasquale Saraceno came to this country in the year 1899 from the town of Reggie in Calabria, Italy, right opposite Messina. He remained here until January, 1909, when he returned to Italy on account of the earthquake, which occurred at Messina, to look up his relatives. His wife and three children followed him in about four months. September 27, 1910, he returned to this country alone and was detained for examination.... It also appears that he had been twice arrested, as he says on suspicion, being convicted on the second of these occasions October 23, 1907, of carrying a concealed weapon, viz., a revolver, and sentenced to imprisonment for 15 days."
>
> "This alien is ordered to be deported because he falls within the class of 'persons likely to become a public charge' and 'of persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude."

"If there was any evidence competent or otherwise to sustain this finding, the court, though of a different opinion, should not disturb it. **But it is impossible to avoid the conclusion that the real ground for the order is that the immigration authorities think the alien an undesirable citizen, which is a class not excluded by the immigration law. The proof, as we have seen, is that the alien is not without funds, is young, healthy, following the trade by which he has supported himself and his family for years in this country, and is going to his brother, who has lived here for years following the trade of tailor.**"

"The fact that he was arrested four years ago for **carrying a concealed weapon** is no evidence whatever that he is likely to become a public charge. **Nor does that offense involve moral turpitude.**"

"While the powers intrusted to the immigration authorities are very great and important and should not be restricted by the courts it is easy to see that upon the reasoning of the board in this case almost any immigrant might be deported. **The alien is discharged. . . .**"

II.

In the case of Ex parte Edmead (District Court, Dist. Mass. (1928), 27 Fed. (2nd) p. 438), the facts are that Edmead is a young colored woman, worked as domestic, convicted of petty larceny, sentenced to three months in the House of Correction. Later she gaves birth to an illegitimate child, was again ar-

rested for larceny, sentenced to one year in jail. In considering a petition for writ of habeas corpus the Court stated:

> "The only ground of deportation now relied on is that Edmead has been convicted of a "crime involving moral turpitude.' That the expression connotes something more than 'illegal' or 'criminal' is clear—law and morality are by no means identical. The best definition which I have found is Judge Walker's in Coykendall vs. Skrmetta (C. C. A.) 22 Fed (2nd) 120: 'The words 'involving moral turpitude' as long used in the law with reference to crimes, refer to conduct which is inherently base, vile, or depraved, contrary to accepted rules of morality whether it is or is not punishable as a crime. They do not refer to conduct which, before it was made punishable as a crime, was not generally regarded as morally wrong or corrupt, as offensive to the moral sense as ordinarily developed." 22 Fed. (2nd) 120, 121.
>
> "Whether any particular conviction involves moral turpitude under this test may be a question of fact. Some crimes are of such character as necessarily to involve this element; others of which the punishment is quite as severe do not (see Ex parte Saraceno (C. C.), 182 Fed. 955); and still others might involve it or might not. As to this last class, the circumstances must be regarded to determine whether moral turpitude was shown. While there is authority that all larceny involves moral turpitude (see Re A. M. Henry, 15 Idaho 755, 99 Pac. 1054) **I am not prepared to agree that a boy who steals an apple**

from an orchard is guilty of "inherently base, vile, or depraved conduct." Where the larceny is petty I think the circumstances must be inquired into."

"The evidence as it stands about the crimes for which Edmead was convicted does not seem to me to prove moral turpitude. While she does not appear to be a very desirable citizen, she is not on that account to be denied her legal rights."

The Edmead case was appealed to the Circuit Court of Appeals for the First Circuit (1929) (Tillinghast, Immigration Com'r, vs. Edmead, 31 Fed. (2d), p. 81). Although the District Court was reversed, Circuit Judge Anderson dissented. Appellant desires to quote from the dissenting opinion of Judge Anderson:

"I agree with those views. (i e., Judge Ward.) It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child or a foolish college student stealing a sign or a turkey, should be tainted as guilty of a crime of moral turpitude. But such is the logical result of the majority opinion."

"When Blackstone wrote his treatise lauding the justice and reason of the English law, there were, as I recall it, something like 120 capital offenses in England, including larceny of property worth 5 shillings. It was one of the most brutal systems of law ever in force in any land at any time. Blackstone's assumption of personal knowledge from the 'the Great Lawgiver' as to what offenses are mala in se and can 'contract

no additional turpitude from being declared unlawful by the inferior Legislature,' I think absurd. Nothing could be more chaotic, illogical and unethical than our prevailing views and practices as to property rights. **Essentially, our legal and economic structure is predatory. We do not attempt to co-ordinate acquisition with useful productivity. Our common methods of 'big money making' always involve getting the results of other people's productive labor. On any sound and ethical theory of property rights, winnings at gambling—even stock gambling—are as unjustifiable as many kinds of takings condemned by statute as larcenies. Until our code of property rights and wrongs bears more relation to anti-social methods of acquisition, I think the moral turpitude taboo should not be extended to cover such trifling offenses as this ignorant colored girl testifies (there is no other evidence) she committed. This case is of little importance, probably not even to the Appellee; but the doctrine now enunciated may do much harm."**

IN CONCLUSION

Over fourteen and more years ago a mere youth, following extensive service in Oregon National Guards and Third Oregon Regiment, committed some crimes. While paying the penalty to society he utilized his time to become a civil engineer, receiving instructions through university extension courses, which he mastered while locked in a tiny prison cell. Upon final release over eleven years ago he fol-

lowed his profession with esteem, holding highly responsible positions, including employment for the United States Coast and Geodetic Survey, the City of Portland, the Title and Trust Company of Portland, Wallowa Law, Land and Abstract Company of Enterprise, Stevens and Koon, consulting engineers of Portland, and, further, in the year 1933 your petitioner was the originator and designer of the plans and specifications and cost estimates filed with and accepted by the City Council of the City of Portland for a six million dollar sewage disposal plant, which was subsequently voted upon at a special city election. (Tr., p. 8.) He also married a young Oregon woman and is now the sole support of his wife and their three little children, all born in Portland, whose ages are eight, five and three, and the partial support of his aged and crippled father of over seventy years. The little family lived happily together in a small home near the outskirts of Portland.

In the year 1935, over fourteen years since the last crime was committed, Appellee, for reasons firmly concealed, swoops down upon the little family, arrests the father for deportation to Germany and makes the generous offer to send the American-born wife and three little children along! To this almost unbelievable act of barbarity, to this well-nigh incredible, but nevertheless, true story. Appellee asks the Circuit Court of Appeals to become a party by lending its sanction.

"AS TO ITS CRUELTY," SAYS JUSTICE FIELD, "NOTHING CAN EXCEED A FORCIBLE DEPORTATION FROM A COUNTRY OF ONE'S RESIDENCE, AND THE BREAKING UP OF ALL THE RELATIONS OF FRIENDSHIP, FAMILY, AND BUSINESS THERE CONTRACTED. The laborer may be seized at a distance from his home, his family, and his business and taken before the judge (now the immigration inspector) for his condemnation, without permission to visit his home, see his family, or complete any unfinished business." (Fong Yue Ting vs. U. S., 149 U. S., p. 759.)

One of America's foremost legalists, Dr. Zechariah Chafee, Jr., professor of law in Harvard university, expresses the same idea in these words:

"Exclusion of a newly arrived alien by administrative fiat is not a serious hardship, for he simply returns to his old life and takes up the threads where he recently dropped them, BUT EXCLUSION AFTER LONG RESIDENCE IS ANOTHER AFFAIR." (Freedom of Speech, p. 234.)

Appellant respectfully urges that a writ of habeas corpus issue herein and that he be restored to his liberty.

Respectfully submitted,

IRVIN GOODMAN,

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Yeon Building, Portland, Oregon.

No. 7890

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WALTER BAER,

Appellant,

v.

ROY J. NORENE, Divisional Director of Immigration, for the District of Oregon,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

Brief of Appellee

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STATEMENT OF FACTS

The facts upon which this appeal is based are stated adequately in the stipulation of counsel of record herein (Tr. 33-35). The sole issue of law is also stipulated (Tr. 35), it being whether the crimes of burglary in the second degree, as defined by the laws of Idaho, in the year 1917; knowingly uttering a forged bank check, as defined by the laws of Oregon, in the year 1919; and forgery of an endorsement, as defined by the laws of Oregon, in 1921, are crimes involving moral turpitude within the meaning of Title 8, U.S.C.A., Section 155.

The appellant was convicted of each of these crimes at the respective times and places above stated, and imprisoned for each crime for more than a year. He was arrested and granted a hearing upon a warrant of arrest issued by the Secretary of Labor, after which a warrant of deportation issued. Application was made to the United States District Court for the District of Oregon by the appellant for the issuance of a writ of habeas corpus, in which it was urged that the above-mentioned crimes did not involve moral turpitude. From the District Court's order denying the application for habeas corpus and remanding the appellant to the custody of the appelee, the appellant appeals, assigning as error the Court's holding *that the said crimes above-mentioned involved moral turpitude.*

PERTINENT STATUTES

Title 8, U.S.C.A., Section 155, insofar as applicable here, provides as follows:

> "* * * except as hereinafter provided, any alien who, after February 5, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, *or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry;* * * * shall upon the warrant of the Secretary of Labor be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or the judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence, or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this sub-chapter. * * * In every case where any person is ordered deported from the United States under the provisions of this subchapter, or of any law or treaty, the decision of the Secretary of Labor shall be final." (Feb. 5, 1917, Chap. 29, Sec. 19, 39 St. 889.) (Italics ours.)

Section 8400, Idaho Compiled Statutes, 1919:

> "Every person who enters any house, room, apartment, tenement, ship, warehouse, store, mill, barn, stables, outhouse, or other building, tent, vessel, or

railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary. (R.S. Sec. 7014")

Footnote is as follows: "Hist. (See Cr. and P. '64, Sec. 59), R. S. 7014; Re-en. R. C. ib.; Re-en. C. L. ib."

Section 8401, Idaho Compiled Statutes, 1919:

"Every burglary committed in the nighttime is burglary in the first degree and every burglary committed in the daytime is burglary in the second degree. (R.S. Sec. 7015)"

Footnote is as follows: "Hist. R. S. Sec. 7015; Re-en. R. C. ib.; Re-en. C. L. ib."

Section 14-379, Oregon Code Annotated, 1930:

"If any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit any public record whatever, or any certificate, return, or attestation of any clerk, notary public, or other public officer, in relation to any matter wherein such certificate, return or attestation may be received as legal evidence, or any note, certificate, or other evidence of debt issued by any officer of this state, or any county, town, or other municipal or public corporation therein, authorized to issue the same, or any application to purchase state lands or assignment thereof, contract, charter, letters patent, deed, lease, bill of sale, will, testament, bond, writing obligatory, undertaking, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, evidence of debt, or any acceptance of a bill of exchange, indorsement, or assignment of a promissory note, or any warrant, order, or check, or money, or other property, or any receipt for money or other

property, or any acquittance or discharge for money or other property, or any plat, draft, or survey of land; or shall, with such intent, knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited record, writing, instrument, or matter whatever, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two nor more than twenty years. (L. 1864; D. Sec. 584; D. & L. Sec. 592; H. Sec. 1808; B. & C. Sec. 1858; L. 1907, ch. 126, p. 228; L.O.L. Sec. 1996; O.L. Sec. 1996.)"

POINTS AND AUTHORITIES

Point I.

Moral turpitude is defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

Ng Sui Wing v. United States (C. C. A. 7, 1931) 46 F. (2d) 755;

In re Henry, 15 Ida. 755; 99 Pac. 1054; 21 L. R. A. (N. S.) 207;

Opinion of Solicitor, Dept. of Labor, 1911;

Words and Phrases (2d series) 444.

Point II.

It is in the intent with which an act is done that moral turpitude inheres, and a crime committed with malicious

or fraudulent intent manifestly involves moral turpitude.

United States ex rel Mongiovi v. Karnuth, District Director of Immigration, (D. C. N. Y. 1929) 30 F. (2d) 825;

United States ex rel Shladzien v. Warden, Eastern State Penitentiary, et al, (D. C. E. D. Pa. 1930) 45 F. (2d) 204;

United States ex rel Meyer v. Day, (C. C. A. 2, 1931), 54 F. (2d) 336;

United States ex rel Miller v. Tuttle, (D. C. Eastern D. La. 1930) 46 F. (2d) 342;

United States ex rel Medich v. Burmaster, Immigration Inspector, (C. C. A. 8, 1928), 24 F. (2d) 57;

United States ex rel Portada v. Day, Immigration Commissioner, (D. C. N. Y., 1926), 16 F. (2d) 328;

United States ex rel Robinson v. Day Commissioner of Immigration, (C. C. A. 2d. 1931) 51 F. (2d) 1022.

Point III.

The crime of burglary in the second degree in Idaho in 1917 included, as an essential element thereof, an intent to commit larceny or some felony and is thus a crime involving moral turpitude.

Sections 8400-8401, *Idaho Comp. Stat.,* 1919;

43 *Harv. Law Review,* 117-119;

Opinion, Solicitor Dept. of Labor, 1911;

United States ex rel Griffo v. McCandless (D. C. Pa. 1928), 28 F. (2d) 287.

Point IV.

The crimes of knowingly uttering a forged check in the State of Oregon in 1919 and forgery of endorsement in Oregon in 1921 included, as essential elements thereof, an intent to defraud and are thus crimes which involve moral turpitude.

Sec. 14-379, *Oregon Code Annotated,* 1930;

United States ex rel Portada v. Day, Immigration Commissioner, (D. C. N. Y., 1926) 16 F. (2d) 328;

Nishimoto v. Nagle, (C. C. A. 9, 1930) 44 F. (2d) 304;

State v. Wheeler, 20 Ore. 192;

United States ex rel Volpe v. Smith Director of Immigration, 289 U. S. 422;

Ex Parte Wilson, 114 U. S. 417;

Robinson v. Day, (C. C. A. 2, 1931) 51 F. (2d) 1022.

ARGUMENT

Moral turpitude is defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow-man or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

Appellant contends that the term "moral turpitude" is too vague and indefinite to serve as a workable criterion in deportation cases under the Immigration Act (Point VII, Appellant's brief, p. 10). We concede that the term

has been criticised on this ground, but contend that the definition given it by the courts affords little difficulty in its application at least to the crimes with which we are here concerned. We have examined the article cited by appellant, 43 Harvard Law Review, 117, and have discovered that, while as to such crimes as violation of the National Prohibition Law, manslaughter in some instances, etc., the decisions are not altogether harmonious, the author sets forth a group of crimes about which there is little or no conflict in the decisions. At page 119 of that publication is written the following:

> "Almost all courts have construed the words 'moral turpitude' as embracing every form of stealing. Larceny, embezzlement, *burglary,* receiving stolen property, obtaining money under false pretenses, conspiring to defraud, *issuing checks without funds,* are all crimes involving moral turpitude. * * *" (Italics ours.)

The definition submitted we believe to be a widely accepted one, upon which most of the courts agree. It is extracted verbatim from the case of *Ng Sui Wing v. United States,* supra, and while the crimes involved in that case were those of rape, statutory rape, and so on, the court had no difficulty, under the definition here given, in determining that those crimes involved moral turpitude.

The same definition is found in the case of *In Re Henry,* supra, wherein the Supreme Court of Idaho held larceny to be a crime involving moral turpitude and said:

> "It is a crime per se and is innately wrong and violative of the rights of property and of individuals and

> society. To say that this crime could be committed without involving turpitude and carrying with it moral iniquity would be out of the question. While it is true that the expression 'moral turpitude' is not very accurately and precisely defined and that the point at which an act begins to take on the color of turpitude is not very definitely marked and pointed out, still there can be no doubt in the mind of a man of ordinary intelligence that he has long since passed into the confines of moral turpitude before he completes an act of larceny."

Words and Phrases (2d series), Page 444, states the meaning of the word "turpitude" as follows:

> " 'Turpitude' in its ordinary sense involves the idea of inherent baseness or vileness, shameful wickedness, depravity. In its legal sense it includes everything done contrary to justice, honesty, modesty, or good morals. The word 'moral', which so often precedes the word 'turpitude', does not seem to add anything to the meaning of the term other than that emphasis which often results from tautological expression within the divorce statute. *Holloway v. Holloway,* 55 S. E. 191, 126 Ga. 459, L. R. A. (N. S.) 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164; (Citing 5 Words and Phrases, p. 4580; Webster's Dictionary; Black Law Dictionary, and Bouvier's Law Dictionary)."

In an opinion rendered to the Department of Labor, by its Solicitor, in the year 1911, which apparently never was published, the foregoing definitions were considerably amplified, and from a copy of the opinion obtained from the Department of Labor we quote the following:

> "A crime involving moral turpitude may be either

> a felony or misdemeanor existing at common law or created by statute and is an offense: which is malum in se and not merely malum prohibitum; which is actuated by malice or committed with knowledge and intention and not done innocently nor without advertence or reflection; which is so far contrary to moral law, as interpreted by the general moral sense of the community, that the offender is brought into public disgrace, is no longer generally respected, and is deprived of social recognition by good-living persons, but which is not the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, of mistaken principles unaccompanied by a vicious motive or a corrupt mind. By way of illustration from the decided cases it was shown that offenses 'involving moral turpitude' included offenses contrary to chastity and decency (as adultery), *or honesty (as larceny or burglary)*, or veracity (as perjury or forgery), or fair dealing (as breach of trust, extortion or malicious injury), or humane instincts (as acts of cruelty), or the rights of others (as libel or wanton murder), or justice (as bribery), or the public interest, health or morals (as corruption of electoral franchise, selling opium, or keeping a bawdy house), and it was shown that such offenses as trespass, assault and battery, breach of peace, forcible entry and detainer, drunkenness, or harboring fugitives did not 'involve moral turpitude'." (Italics ours.)

The crimes with which we are concerned in this case plainly come within the term "moral turpitude" as is thus defined and illustrated in the opinion of the Solicitor of the Department of Labor, and in the cases hereinafter discussed.

II.

It is in the intent with which an act is done that moral turpitude inheres, and a crime committed with malicious or fraudulent intent manifestly involves moral turpitude.

Whether a particular crime is within the class designated as crimes involving moral turpitude is most surely determined by the character of the intent with which an act is committed. Appellant inquires "Since even manslaughter has been held by the Federal Court not to be a crime involving moral turpitude, how can this court determine that knowingly uttering a forged bank check and forgery of endorsement, committed by a mere youth fifteen or more years ago, involve moral turpitude?" (Point VIII, appellant's brief, p. 12).

The case of *United States ex rel v. Karnuth,* supra, cited by counsel in support of the contention implied in his inquiry just quoted, clearly answers appellant's contention. In that case the court was called upon to determine whether manslaughter in the second degree, as defined by the statutes of New York, was a crime involving moral turpitude. The statute defines the crime of manslaughter in the second degree as a *crime committed without design to effect death.* The court there held that since it did not include "an evil intent or commission of the act wilfully or designedly and it expressly includes an act resulting in death without design to injure or effect death," it did not inherently involve moral turpitude. (Italics ours.)

The court distinguished the *Mongiovi* case from the case of *Weedin v. Yamada,* 4 F. (2d) 455—the latter involving the crime of assault with a deadly weapon—on the ground that the crime of assault with a deadly weapon was committed *with the intent to do bodily harm* and therefore was a crime involving moral turpitude.

We are in thorough accord with the law in the *Mongiovi* case, and believe the distinction made by Judge Hazel between the crime of manslaughter in the *Mongiovi* case and the crime of assault with a deadly weapon in the *Yamada* case a perfectly sound one, resting, as it does, on the intent with which the two crimes were committed.

As said in the case of *United States v. Warden* of *Eastern State Penitentiary;* supra,

> "The moral turpitude of the offense springs from the intent."

So in the case of *United States ex rel Meyer v. Day, supra,* where the relator, an alien, had been convicted of the crimes of robbery and attempt to commit robbery and it was contended that there is a distinction between the attempt and commission of the substantive offense so far as moral turpitude is concerned, the Circuit Court of Appeals for the Second Circuit said:

> "There is no substance in appellant's contention. * * * An attempt involves specific intent to do the substantive crime * * * and if doing the latter discloses moral turpitude, so also does the attempt, *for it is in the intent that the moral turpitude inheres.* * * *" (Italics ours.)

In the case of *United States ex rel Miller v. Tuttle, supra,* where the appellant had been convicted of the offense of encumbering mortgaged property with intent to defraud, and as a defense to the deportation proceedings instituted against him by the Department of Labor contended that such a crime did not involve moral turpitude, the court said:

> "I think counsel is correct in the contention that the court is not bound by the finding of the District Court that the crime involved moral turpitude, for this is a question of law. But the bill of information in this case charged that the defendant executed the second chattel mortgage encumbering mortgaged property *"designing and intending to defraud,"* and to which offense as charged petitioner pleaded guilty. * * * Of course, it would make no difference that payment was afterwards made if at the time he committed the act with a fraudulent purpose. The Department having shown a prima facie case of *conviction of an offense with intention to defraud, which on its face, I think, implies moral turpitude,* the burden was then upon the petitioner to show by sufficient evidence that it did not involve the circumstances denounced by the Act of 1917. * * * I think it hardly necessary to cite authority to support the proposition that *the commission of a fraud involved moral turpitude."* (Italics ours.)

The same principle underlies the holding of the court in the case of *United States ex rel Medich v. Burmaster, supra,* where the alien had entered a plea of guilty to an indictment charging concealment of assets from a trustee in bankruptcy. The court there determined that such a

crime involved moral turpitude, since the alien had invoked the aid of the bankruptcy law and had then violated the duty which the law imposed upon him—that of scheduling and delivering to the trustee in bankruptcy all of his assets, and said:

> "Confessedly, he withheld and concealed assets which he knew belonged to the trustee for distribution to his creditors. This was done contrary to honesty and good morals and was shameful wickedness on his part and thus involved moral turpitude."

Whatever change might have occurred in the moral viewpoint of society since the year 1917, as suggested by appellant in his brief (Points V and VI, pages 9 and 10), it would seem to be clear from the foregoing cases that the courts at least are in accord on the proposition that acts committed with a wicked, vicious or fraudulent intent are still contrary to the accepted and customary rule of right and duty between man and man.

The cases of *Robinson v. Day,* and *Portada v. Day,* supra, likewise rest the determination of the moral character of a crime upon the intent with which its commission was accompanied. The facts in those cases will be more fully discussed, however, by way of showing the specific application of the rule of intent to crimes of forgery and issuance of checks without funds.

III.

The crime of burglary in the second degree in Idaho in 1917 included, as an essential element there-

of, an intent to commit larceny or some felony and is thus a crime involving moral turpitude.

We do not dispute appellant's contention that the courts in determining whether or not a crime involves moral turpitude must look only to the inherent nature of the crime or to the facts charged in the indictment (pages 6 and 7, appellant's brief). We accordingly invite this court's attention to Section 8400, Idaho Comp. Stat., 1919, and Section 8401, Idaho Comp. Stat. 1919, defining the crime of burglary in the second degree as follows:

> "Sec. 8400: Every person who enters any house, room, apartment, tenement, ship, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, or railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary.
>
> "Sec. 8401: Every burglary committed in the nighttime is burglary in the first degree and every burglary committed in the daytime is burglary in the second degree."

It will be noted that the statute defining the crime of burglary in the second degree requires, as an essential element thereof, a larcenous or felonious intent. Appellant has not considered the moral character of the crime of burglary in his brief, has offered no argument on that particular offense, and has mentioned it only to point out that the petition alleges appellant had received a pardon from the State of Idaho for that crime (Appellant's brief, p. 8). The record does not contain evidence of such a pardon having been received by the appellant, however,

and we do not concede that such is the fact. On the contrary, the stipulation of counsel recites as one of the issues of law herein to be determined the crime of burglary in the second degree in the State of Idaho in 1917 (Tr. p. 35).

In addition to its inclusion in the class of cases clearly involving moral turpitude as found in 43 Harvard Law Review, 119, and its use by way of illustration as a crime contrary to honesty and therefore one involving moral turpitude in the *Opinion of the Solicitor of the Department of Labor, supra,* we call the court's attention to the case of *United States ex rel Griffo v. McCandless, supra,* wherein the court said:

> "This relator served a term of imprisonment of more than one year for burglary. He would be in consequence clearly within the Act (Immigration Act), except for the further provision that the crime must have been committed 'within five years' after the alien came to this country. * * * whether the commission of the act of aggravated assault and battery carries with it the conviction, also, of moral depravity. Burglary undoubtedly does. Assault and battery may or may not. It is easily conceivable that the law may condemn it when the judgment of good men may unhesitatingly excuse, or sometimes, applaud it. * * *"

We have nowhere found any authority to the contrary, and we therefore submit that burglary as defined in the Idaho statute is a crime involving moral turpitude.

IV.

The crimes of knowingly uttering a forged check in the State of Oregon in 1919 and forgery of endorsement in Oregon in 1921 included, as an essential element thereof, an intent to defraud and are thus crimes which involve moral turpitude.

The inherent nature of the crimes of knowingly uttering a forged check and forgery of endorsement is ascertained by an examination of *Section* 14-379, *Oregon Code Annotated,* 1930, *supra.* Both of these crimes, by the Oregon statute, include the specific intent to injure or defraud. The statute as herein set forth has been the law of Oregon, unchanged by amendment since the year 1907. It is the appellee's contention that these crimes on their face involve moral turpitude, since the intention to injure or defraud manifests a depraved mind and is contrary to honesty, justice, principle and good morals.

The case of *Portada v. Day, supra,* is conclusive authority for this position. There the crime involved was the issuance of a check without funds with intent to defraud. The facts briefly were these:

The relator was an alien who was engaged in the fruit business in New York City. In 1924 he went to California to purchase some fruit, and in payment for a quantity of fruit he gave his check for $100 to a commission merchant. Later the payee of the check called the relator on the telephone and advised him that the $100 check had been lost and that he desired another one. Acting on this representa-

tion of the payee of the original check, the relator drew a second check for $100 to the same payee, who attempted to cash it, but was unable to do so because the bank informed him there were insufficient funds to cover the same, the shortage being approximately $7.50. Thereafter the relator was arrested and was wrongfully advised by one whom he retained as his attorney, but who apparently was not a lawyer, to plead guilty and that he would be lightly dealt with. The relator did plead guilty and, as a result of his plea, was sentenced to from one to four years in San Quentin.

The statute of California to which the relator pleaded guilty, so far as here material, read:

> "Every person who wilfully, *with intent to defraud,* makes or draws * *." (Italics ours.)

Thereafter the relator was arrested on a warrant issued by the Secretary of Labor for his deportation, charging commission of a crime involving moral turpitude within five years after entry. On a habeas corpus hearing the court dismissed the writ and remanded the relator to custody of the Commissioner of Immigration, stating, after referring to so much of the statute as is here quoted:

> "The difficulty in the case at bar, however, is the relator has pleaded guilty to a *willful intention to defraud.* The first part of Section 476 (a), under which he pleaded, reads as follows: 'Every person who wilfully, with intent to defraud, makes or draws * * *.' This court is bound by the record, and it is not open to question that such an act is one involving moral turpitude." (Italics ours.)

The court also distinguished this from other cases cited by counsel on the hearing, on the ground that the other cases turned upon the question of whether the act charged against the person carried with it a vicious intent or moral depravity and that the mere having of narcotics or a pistol in one's possession, etc., "did not necessarily indicate moral turpitude, because the *intention* of committing an act of baseness or viciousness was absent or unproven."

The case of *Nishomoto v. Nagle, supra,* decided by this court, also involved the crime of issuance of checks with intent to defraud. It was not there contended by the alien, however, that the offense did not involve moral turpitude, the sole question being whether conviction and sentence on five counts of an indictment, to run concurrently, were within the requirements of the Immigration Act that the alien be "sentenced more than once." The fact that it was not contended in that case that such an offense does not involve moral turpitude is very convincing that the contrary is true and that the moral guilt of the offender in such a case is too widely and generally accepted to be otherwise seriously urged before a court of record.

It is difficult to distinguish between the moral character of such a crime and the crime of knowingly uttering forged checks with intent to defraud. The intent and objective of the wrongdoer are identical, the only difference being in the details of the scheme by which it is sought to accomplish the fraudulent end.

There remains for consideration only the crime of forgery of endorsement in Oregon in 1921. This crime is defined also by *Section* 14-379, *Oregon Code, Annotated* 1930, and as judicially defined in *State v. Wheeler, supra,* a leading Oregon case, include, as essential elements: (1) a false making of some instrument in writing; (2) *a fraudulent intent;* (3) an instrument apparently capable of effecting the fraud." The crime of forgery, as defined by the Oregon statute, was known to the common law as an infamous crime, involving, as it did, the element of fraudulent intent. 2 Wharton's Criminal Law (3d ed.) Section 860.

The *Solicitor of the Department of Labor,* in his opinion, *supra,* includes forgery as a crime involving moral turpitude in that it is contrary to veracity and is thus classed with the crime of perjury.

In the case of *Volpe v. Smith, supra,* the Supreme Court of the United States determined that counterfeiting plainly involved moral turpitude. Forgery fundamentally would seem to be akin to counterfeiting, since both offenses are designed to cheat and defraud, to obtain money by the use of false pretenses, and by the use of false tokens, and while there seems to be no reported case in which the Supreme Court has been called upon to determine directly that forgery involves moral turpitude, its similarity to the crime of counterfeiting seems to bring it within the Supreme Court's holding in *Volpe v. Smith.*

In *Ex Parte Wilson, supra,* the Supreme Court again determined that passing counterfeit securities was an infamous crime in which the accused was entitled to be tried only on presentment or indictment by Grand Jury. In discussing the origin and meaning of the term "infamous", the court referred to the class of infamous crimes, conviction for which disqualified one from testifying, and there included forgery with arson, treason and "crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery * * * etc." Thus it is seen that forgery has long been classed as an infamous crime reflecting discreditably upon the moral character of the offender, and particularly his veracity.

Such being its origin, and present character it clearly is contrary to honesty, justice, principle and good morals, and violative of the customary and accepted rule of right and duty between man and man.

The case of *Robinson v. Day, supra,* is a case squarely in point, wherein the Circuit Court of Appeals for the Second Circuit was asked to decide whether an alien who had been convicted by a plea of guilty on an indictment charging forgery in the third degree in New York, but whose sentence had been suspended, was deportable under the terms of the Immigration Act. Circuit Judge Hand delivered the opinion of the court, and on this point said:

> "Forgery in all its degrees, as defined by the Penal Code of New York (Penal Law 2, Sec. 880, et seq.)

> *involves an intent to defraud and is thus a crime of moral turpitude.* Neither the immigration officials nor we may consider the circumstances under which the crime was, in fact, committed. When, by its definition, it does not necessarily involve moral turpitude, the alien cannot be deported because in a particular instance his conduct was immoral (citing cases). Conversely, when it does no evidence is competent that he was, in fact, blameless." (Italics ours.)

The relator in that case was discharged, but on the ground that a suspended or unexecuted sentence did not bring an alien within the meaning of the phrase "sentenced to imprisonment for a term of one year or more."

We find no authority, and appellant cites none, for his proposition that the Circuit Court of Appeals should take judicial notice of the fact that municipal judges daily dispose of such crimes as forgery and knowingly uttering forged checks as check vagrancy cases, and they are not, therefore, crimes involving moral turpitude. (Appellant's brief, p. 10, Point VI). We assume that the check cases brought into the municipal courts are disposed of in accordance with the respective city ordinances defining the crimes for which the arrests are made. Whether they do or do not involve moral turpitude would necessarily have to be determined by considering the provisions of the applicable ordinances, and "gravity of punishment is not controlling." (Appellant's brief, p. 6, and authorities there cited).

CONCLUSION

We wish briefly to comment on the cases of *Ex Parte Saraceno,* 182 F. 955, and *Ex Parte Edmead,* 27 F. (2d) 438; also *Fong Lue Ting v. United States,* 149 U. S. 759, which appellant has submitted to this court for its serious consideration.

In the Sarceno case it is merely determined that conviction of the crime of carrying a concealed weapon is not an act involving moral turpitude. We agree with such conclusion. It is not an act manifesting a depraved mind, nor does it involve a specific felonious intent. It is not contrary to honesty, justice or good morals, nor a violation of the customary rule of right and duty between man and man. There is nothing inherently immoral in carrying a concealed weapon. In fact, the right to keep and bear arms, as said by the court in the Saraceno case, is guaranteed by the Constitution of the United States and is an act which the State of New York may in its discretion, and frequently does, license and thus legalize.

The court therefore held that the mere failure to obtain a license, in compliance with the State's regulations, in order to carry a concealed weapon did not involve moral turpitude. We think such a crime is too obviously of a different class than the crimes for which the appellant here has been convicted to require further discussion.

In the Edmead case it was determined by the District Court that petit larceny did not involve moral turpitude.

Upon appeal, however, the Circuit Court of Appeals *(Tillinghast, Immigration Commissioner v. Edmead,* 31 F. (2d) 81) reversed the District Court and held that larceny, either grand or petit, was contrary to honesty and good morals and therefore involved moral turpitude. We accept the doctrine there enunciated unquestionably as the true rule of law and find nothing in that case which is in any way inconsistent with the position which we have taken in the instant case.

The dissenting opinion of Mr. Justice Fields in the case of *Fong Lue Ting v. United States,* 149 U. S. 759, to which appellant refers, is likewise not inconsistent with our position in the instant case. We recognize that the enforcement of the Immigration Act might, and undoubtedly does, in some cases work hardships on certain aliens. We call the court's attention, however, to the following exceptions in the Immigration Act:

> "* * * provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence * * *, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this subchapter. * * *"

The Congress has taken into consideration the harshness which might result from a strict enforcement of the

law, regardless of mitigating circumstances, and has vested in the various pardoning authorities, as well as the courts passing sentence, after conviction of aliens for crimes involving moral turpitude, the power to avoid the provisions of this Act, where the circumstances in a given case would seem to warrant leniency.

It would appear, therefore, that if the facts and circumstances surrounding the commission of the crimes for which appellant has been convicted are such as to merit leniency, application therefor should not be made to the federal courts by writ of habeas corpus, but directly to the Governor or the pardoning authorities in the States of Idaho and Oregon, before whom all mitigating circumstances might properly be urged.

Where, however, no pardon is granted nor recommendation made by the judge who imposed sentence, it is mandatory upon the Secretary of Labor to order the deportation, and if due process of law has been had the Secretary's decision thereon is final. As was said in the Portada case, in which there appeared to be many mitigating circumstances:

> "Although the result is harsh and unjust, I must, for I have no power to do otherwise, dismiss the writ and remand the relator to the custody of the Commissioner of Immigration."

And in the case of *United States v. Warden, Eastern State Penitentiary, supra,* in which the alien, who had been a resident of the United States since shortly after his birth

and who had been convicted of offenses involving moral turpitude, was refused a writ of habeas corpus, the court said:

> "The provisions of the Immigration Law must necessarily and unavoidably result in individual hardship in some cases. The law itself, however, is one which everyone must recognize as necessary protection for the people, and the particular hardship must be accepted as part of the cost of the general good."

We believe, therefore, that the order of the District Court denying the petition for writ of habeas corpus and remanding the petitioner to the custody of the immigration authorities should be affirmed.

Respectfully submitted,

CARL C. DONAUGH,
United States Attorney for the District of Oregon.

HUGH L. BIGGS,
Assistant United States Attorney.
Attorneys for Appellee.

No. 7892

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ELLIOTT PETROLEUM CORPORATION,
Respondent.

Transcript of Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Co., 545 Sansome Street, San Francisco 60—8-13-35

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Petitioner:

ROBERT N. MILLER, Esq.,

MELVIN D. WILSON, Esq.,

For Commissioner:

I. GRAFF, Esq.,

E. G. SIEVERS, Esq.,

Docket No. 71769

ELLIOTT PETROLEUM CORPORATION,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES.

1933

May 1—Petition received and filed. Taxpayer notified. (Fee paid).

May 2—Copy of petition served on General Counsel.

June 1—Answer filed by General Counsel.

June 7—Copy of answer served on taxpayer, General Calendar.

1934

Mar. 19—Motion for Circuit hearing in Los Angeles, Calif., filed by taxpayer, Mar. 20, 1934 Granted.

Mar. 30—Hearing set beginning June 4, 1934 in Beverly Hills, Calif.

1934

June 11—Hearing had before Mr. Adams on merits, submitted. Stipulation of facts filed. Petitioner's brief due July 12, 1934. Respondent's brief due August 12, 1934.

July 9—Brief filed by taxpayer. July 9, 1934 Copy served on General Counsel.

Aug. 11—Motion for extension to Sept. 12, 1934 to file brief, filed by General Counsel. Aug. 13, 1934 Granted.

Sept. 19—Motion for extension to Oct. 12, 1934 to file brief, filed by General Counsel. Sept. 12, 1934.—Granted to Oct. 12, 1934.

Oct. 12—Brief filed by General Counsel.

Oct. 20—Reply brief filed by taxpayer. Oct. 22, 1934 Copy served on General Counsel.

1935

Jan. 2—Memorandum Opinion rendered, Jed C. Adams, Division 12. Decision will be entered for the petitioner.

Jan. 3—Decision entered, Annabel Matthews, Division 13.

Mar. 19—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

Mar. 30—Proof of Service filed by General Counsel.

Apr. 11—Praecipe filed by General Counsel.

May 13—Proof of service filed.

May 17—Order enlarging time to June 30, 1935 for transmission and delivery of record, entered. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals

Docket No. 71769

ELLIOTT PETROLEUM CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:AR:E-4 AMcM-60D, dated March 8, 1933, and as a basis of its proceeding alleges as follows:

1. The Petitioner is a corporation with principal office at 417 South Hill Street, Los Angeles, California.

2. The notice of deficiency, a copy of which is attached and marked "Exhibit A", was mailed to the Petitioner on March 8, 1933.

3. The taxes in controversy are corporation income taxes for the calendar year 1930, and for $1,045.29.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) Respondent erred in disallowing depletion of $19,167.44. [2]

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

(a) In 1930, Petitioner received $69,699.81 as gross and net income from certain oil and gas producing property in which Petitioner had a depletable interest.

(b) Petitioner is entitled to a depletion deduction of 27½ per cent of the gross income, or $19,167.44.

WHEREFORE, the Petitioner prays that this Board may hear the proceeding and find that Petitioner is entitled to depletion in the sum of $19,-167.44.

ROBERT N. MILLER
c/o Miller & Chevalier,
922 Southern Building,
Washington, D. C.

MELVIN D. WILSON
c/o Miller, Chevalier,
Peeler & Wilson,
819 Title Insurance Bldg.,
Los Angeles, California.
Counsel for Petitioner. [3]

State of California,
County of Los Angeles—ss.

F. C. MERRITT, being duly sworn, says:

That he is the Vice President of ELLIOTT PETROLEUM CORPORATION, the Petitioner

above-named, and as such officer is duly authorized to verify the foregoing Petition; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

[Seal] F. C. MERRITT

Subscribed and sworn to before me this 28th day of April, 1933.

[Seal] CHARLES E. KERN

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Sept. 3, 1935.

[Endorsed]: Filed May 1, 1933. [4]

EXHIBIT A.

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

March 8, 1933.

Address Reply to
Commissioner of Internal Revenue
and Refer to

Elliott Petroleum Corporation,
417 South Hill Street,
Los Angeles, California.

Sirs:

You are advised that the determination of your tax liability for the year(s) 1930 discloses a defi-

ciency of $1,045.29, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT-C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By W. T. SHERWOOD
Acting Deputy Commissioner.

Inclosures:
Statement
Form 870. [5]

STATEMENT

IT:AR:E-4
AMcM-60D

In re: Elliott Petroleum Corporation,
417 South Hill Street,
Los Angeles, California.

INCOME TAX LIABILITY

Year—1930
Income Tax Liability—$1,045.29
Income Tax Assessed—None
Deficiency—$1,045.29

Net loss shown on the return	($40,564.11)
Addition to income:	
Depletion disallowed	52,274.86
Adjusted net income	$11,710.75

EXPLANATION OF ADJUSTMENT

In the adjustment of profit on the sale of Clark Lease during the taxable year 1928, the contract to receive $137,500.00 out of subsequent production of oil was included in the sale price at its fair market value which was considered to be 75%.

In consideration of a claim for refund for the year 1928, the discounted value for subsequent payments was eliminated in accordance with the decision of the United States Supreme Court in the case of Burnet v. Logan. The subsequent payments out of oil produced are, therefore, taxable in full in the year received.

It is held that depletion on the payments out of oil produced is not allowable since the corporation retained no depletable interest after assignment.

COMPUTATION OF TAX

Net income	$11,710.75
Less:	
Credit	3,000.00
Balance taxable at 12%	$ 8,710.75
Income tax at 12%	$ 1,045.29
Income tax previously assessed	None
Deficiency	$ 1,045.29

[6]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations of fact contained in paragraphs (1), (2), and (3), of the petition.

4. Denies that the respondent erred in the determination of the said deficiency as alleged in paragraph 4 (a), of the petition.

5. Denies all the material allegations of fact contained in sub-paragraphs (a) and (b), of paragraph (5), of the petition.

6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Signed) C. M. CHAREST.
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
FRANK B. SCHLOSSER,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Jan. 1, 1933. [7]

[Title of Court and Cause.]

STIPULATION.

The parties hereto, through their respective counsel, Messrs. Miller, Chevalier, Peeler & Wilson, by Melvin D. Wilson, Esq., for the Petitioner, and Robert H. Jackson, Esq., General Counsel, Bureau of Internal Revenue, for the Respondent, hereby stipulate and agree that the following may be considered as facts in this cause:

1. The Petitioner is a corporation having its principal office and place of business in Los Angeles,

California. It filed a corporation income tax return for the calendar year 1930 with the Collector of Internal Revenue for the Sixth Collection District in Los Angeles, California.

2. On or about June 13, 1922, J. E. Elliott leased certain oil bearing land in the County of Los Angeles from Chauncey Dwight Clarke and Marie Rankin Clarke. A copy of said Lease is attached hereto and marked Exhibit "A". [8]

3. On the 27th day of June, 1922, J. E. Elliott and Lillian F. Elliott, his wife, assigned all of their right, title and interest in and to the said Clarke Lease to the Petitioner. A copy of said Assignment is attached hereto and marked Exhibit "B".

4. On August 17, 1928, the Petitioner entered into an Agreement with the Richfield Oil Company of California. This Agreement was called "Assignment of Oil and Gas Lease", a copy of which is attached hereto and marked Exhibit "C".

5. On August 17, 1928, the Petitioner entered into an Agreement with the Richfield Oil Company of California designated "Bill of Sale", a copy of which is attached hereto and marked Exhibit "D".

6. On August 17, 1928, the Petitioner entered into an Agreement with the Richfield Oil Company of California, designated "Collateral Agreement", a

copy of which Agreement is attached hereto and marked Exhibit "E".

7. The Agreement between the Petitioner and the Richfield Oil Company of California, was carried out in all respects from the date of its agreement through December 31, 1930. Petitioner received from the Richfield Oil Company of California, on account of said Agreement, in 1930, the sum of $69,699.81.

8. If Petitioner is entitled to a deduction from said gross income of $69,699.81 for depletion, the amount of such deduction shall be $19,167.44, which is 27½ per cent of the said $69,699.81. [9]

Petitioner received in 1928 from The Richfield Oil Company of California on account of said agreements the cash consideration of $137,500.00 mentioned in said agreement plus $19,494.58 on account of the balance of the consideration mentioned in said agreement, or an aggregate amount of $156,-994.58. In 1929 petitioner received $35,797.68 on account of the balance of the consideration mentioned in said agreement. At the time of petitioner's said agreements with Richfield Oil Company of California, petitioner's unrecovered capital cost of the said Clarke Lease was $38,272.53. In the final determination of petitioner's tax liability for 1928 the Commissioner of Internal Revenue deducted said unrecovered capital cost from the said amount of

$156,994.58 in arriving at the taxable net profit from the transaction.

Dated: June 7, 1934.

MELVIN D. WILSON,
Miller, Chevalier, Peeler & Wilson
819 Title Insurance Bldg.,
Los Angeles, California.
Counsel for Petitioner.

ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.
Counsel for Respondent. [10]

EXHIBIT "A"

LEASE

Between

CHAUNCEY DWIGHT CLARKE
MARIE RANKIN CLARKE

and

J. E. ELLIOTT

DATED JUNE 13, 1922.

(Assignment to Elliott Petroleum Corporation—6/27/22)

[11]

THIS INDENTURE OF LEASE, made and entered into at Los Angeles, California, this 13th

day of June, 1922, by and between CHAUNCEY DWIGHT CLARKE and MARIE RANKIN CLARKE, hereinafter referred to as "Lessors" and J. E. ELLIOTT, hereinafter referred to as "Lessee";

WITNESSETH:

That for and in consideration of the making of this lease and of the royalties, rents and royalties to be paid by the Lessee to Lessors, as hereinafter specified, and in further consideration of the covenants, agreements and stipulations by Lessee hereinafter set forth, Lessors do hereby lease, demise and let unto the Lessee, and the Lessee does hire and accept from the Lessors, for the term and time, and for the purposes herein specified, and in accordance with the covenants, agreements and conditions hereinafter set forth, all that real property situate in the County of Los Angeles, and State of California, and more particularly described as follows: to-wit:

A portion of the fractional northeast quarter (NE¼ of the Northeast quarter (NE¼) of Section One (1), Township Three (3) South, Ran*ch* Twelve (12) West, of the Rancho Santa Gertrudes subdivided for the Santa Gertrudes Land Association, as per map recorded in Book 1, page 502 of Miscellaneous Records, in the Office of the Recorder of said County, described as beginning at the intersection of the southerly line of the Anaheim Telegraph Road with the east line of said Section One (1), thence South 0° 10' 15" East along said East

line of Section One (1) 544.15 feet; [12] thence North 63 38' 35" west 491.39 feet, thence north 8 42' 25" East 510.91 feet to the southerly line of the said Anaheim Telegraph Road; thence south 63 38' 35" East along the said southerly line of the said Anaheim Telegraph Road 403.32 feet to the point of beginning, containing five (5) acres, situated in the County of Los Angeles, State of California: excepting that part of the surface of said premises included in the orange grove of Lessors and being that part of said premises lying and being westerly of the cement wall running northerly and southerly thereon;

together with the right and privilege to mine, excavate, bore, drill, sink for and otherwise collect, take and remove, and develop asphaltum, petroleum, natural gas, tar, and any and all other hydrocarbon substances and products from, upon and under the said premises, and also the right to construct, maintain and use on so much of the surface of said premises, except said surface of said part of said premises westerly of said wall, for such buildings, fixtures and machinery as may be needed or convenient in carrying on said business and mining operations, and to construct and maintain upon, over and across and along said premises such telephone, electric, water and pipe lines, highways, reservoirs and tanks as may be needed or convenient, together with rights of way over and across and along said lands for the passage and conveyance of

said Lessee, his agents and employees for transporting supplies and machinery and products of said mining operations and for the purpose of carrying on said business generally.

1.

The term of this lease shall begin at the date hereof and extend for a period of twenty (20) years therefrom, subject to earlier termination, [13] or extension, of the rights of Lessee, as hereinafter provided.

2.

The Lessee, in consideration of the premises, hereby covenants and agrees with the Lessors as follows:

(a) That the Lessee will on or before August 15, 1922, begin with a full size modern rotary drilling rig and the necessary machinery and appliances, the actual drilling of a well at least twelve and one-half (12½) inches in diameter, at the top and continuing for said diameter for approximately twelve hundred (1200) feet, intended and designed to develop the deposits of said hydrocarbon substances supposed to exist in said premises, at a point thereon mutually agreed upon by Lessors and Lessee; that said drilling point shall not be changed for more than approximately fifty (50) feet therefrom or shall more than one (1) well be drilled on said premises without the written consent of Lessors; that Lessee will from and after said August 15,

1922, diligently and continuously in a skillful, efficient and workmanlike manner prosecute the work of drilling said well until a well has been drilled to a depth of five thousand (5,000) feet, unless oil is found in paying quantities at a lesser depth; provided, however, that if in the drilling of said well there should be encountered such formation as to justify experienced oil geologists in the belief that further oil drilling would be unproductive of oil or other hydrocarbon substances in paying quantities, or that further drilling would be unprofitable or impracticable, Lessee may at his option abandon such work and be relieved of further drilling obligations hereunder by surrendering possession of said premises unto Lessors and executing to Lessors a deed of conveyance sufficient in form and substance to clear Lessors title of the leasehold estate hereby created; it being the purpose and intention of the parties hereunto that a well shall be promptly drilled by the Lessee to test said land for the mineral deposits aforesaid and to develop such deposits if discovered; and because of similar activities upon adjacent lands expedience in the completion of such a well is necessary for the [14] protection of the parties hereto, and Lessee promises and undertakes to perform such work and complete such a well in the manner and for the purposes aforesaid, and if said well is destroyed or not completed as herein contemplated, Lessee will within sixty (60) days after the cessation of drilling said well, begin and prosecute the drilling and completion of another

well on said premises as provided herein for the drilling and completion of the well herein contemplated and at a point thereon mutually agreed upon designated by Lessors and Lessee.

(b) Lessee will pay in cash to Lessors on or before August 15, 1922, the sum of Eight thousand dollars ($8,000.00) paying to each Lessor one-half thereof for the right to drill on said premises as herein specified; and Lessee further agrees to pay to Lessors out of oil or gas or other hydrocarbon substances or by-products thereof which may be produced from said premises by the Lessee hereunder, the sum of Sixteen thousand dollars ($16,000.00) paying to each Lessor one-half thereof payable on or before eight (8) years after the discovery of oil or gas or other hydrocarbon substances in paying quantities by the Lessee on said premises and payable in installments of at least Two thousand dollars ($2,000.00) per year commencing on or before ninety (90) days after discovery of said oil or gas or other hydrocarbon substances or by-products thereof which may be produced, saved and sold from said premises by the Lessee, and if oil or gas or such other substances or by-products thereof in paying quantities is not found on said premises, then any obligation to pay said sum of Sixteen thousand dollars ($16,000.00) shall terminate and be discharged; and Lessee will, so long as this lease remains in force and effect, either in whole or in part, deliver and pay to said Lessors as royalty or

rental, in addition to the above specified sums, thirty per cent (30%) paying to each Lessor one-half thereof, of all the settled oil, gas and other hydrocarbon substances, and by-products thereof, produced and saved from said premises, after deducting from said total an amount of oil and gas necessary or essential and actually used by Lessee in the carrying on of the works of drilling and operating said well and [15] producing said products; and will furnish out of the gross oil and gas to Lessors at said well without charge or expense to them, except for connections and piping and at Lessors' risk, oil and gas for use on the adjoining premises of Lessors for domestic and pumping purposes for irrigation on said adjoining premises; Lessee agrees that at the option of Lessors, Lessee will deliver said thirty per cent (30%) royalty at the tanks or reservoirs upon said premises, or he will sell such royalty oil, gas or other hydrocarbon substances or by-products thereof for Lessors without expense or charge to Lessors at the prevailing market price of such as and when and for same prices and upon the same conditions he sells his portion thereof; unless Lessors make written demand upon the Lessee to deliver all such royalty in kind. From time to time Lessors shall have the right to elect either to take such royalty in kind or to require Lessee to sell same, as above specified, giving the Lessee at least thirty (30) days' notice in advance of the exercise of such right of election. If Lessors shall take such royalty in kind the Lessee shall provide storage

therefor upon said premises for a period of thirty (30) days after the 15th day of each month when said royalty is payable and shall allow Lessors the use of his pipe line and loading rack and facilities for loading and transporting such royalty, all without charge to Lessors; deliveries of said royalty if taken in kind shall be made unto the Lessors monthly on the 15th day of each calendar month for the royalty due the preceding month.

(c) If casinghead gasoline or any other product shall be made from gas produced or found or saved from or upon said premises, then and in such event Lessors shall receive and be entitled to thirty per cent (30%) each of Lessors receiving one-half of said thirty per cent (30%) of the prevailing market price therefor at the well upon said premises at the time of the manufacture thereof, less thirty per cent (30%) of the actual cost and expense of manufacture, provided, that no overhead expense shall be included in the said costs of manufacture. [16]

(d) That Lessee will not erect or construct any oil derrick on said premises within three hundred (300) feet of any dwelling house which at the time of the commencement of said well has been constructed on said premises.

(e) Lessee shall keep on said premises or at Los Angeles, California, accessible to Lessors, accurate books of account showing the production of said substances from said premises, and the by-products

thereof, the quality, gravities, value, prices and quantities thereof, the consignees and points of delivery, and Lessors shall have access thereto at all reasonable times, either personally or by their representatives. When Lessors shall take royalty in kind, Lessee shall furnish Lessors on or before the 15th day of each calendar month with a statement showing the quantities, qualities, and gravities of all oil and gas and other substances and by-products thereof produced on or from said premises during the preceding calendar month. While Lessors are not taking royalty in kind, Lessee shall render Lessors on the 15th day of each successive calendar month, an accurate account and statement showing the quantity of production of oil and gas and other substances and by-products thereof during the preceding calendar month and the quality, gravity and sale price if sold, thereof; at the same time Lessee shall account for and pay to Lessors any sum or sums which Lessee may have received or collected for Lessors, which Lessors shall be entitled to for royalty; such statements of production shall also include all of the information given the State Mining Bureau as to the production of said premises according to the monthly report furnished such Bureau; if no monthly report to said Bureau shall be required, such statement shall show the estimated production from said premises for the given period.

(f) That Lessee will upon the termination of this lease for any cause whatsoever remove from

said premises within a reasonable time after demand by Lessors, all machinery, appliances, buildings and structures and improvements placed by the Lessee thereon, subject, however, to the rights of Lessors thereto or any part thereof as specified in this lease. [17]

(g) That Lessee will in any action or proceeding wherein Lessors prevail to remove any cloud resting upon said premises or any part thereof by reason of the making of this lease or of any person or persons claiming by, through or under him any interest in said premises, upon demand pay to Lessors the court costs and expenses of such proceeding including a reasonable attorney's fee to be fixed by the court in such proceeding for the institution and prosecution of such action.

(h) That Lessee will give to Lessors at least thirty (30) days prior notice in writing before removing any derrick or machinery or appliances or buildings or structures or the casing of any well, from said premises, except that any contractor may remove any machinery, appliances, structures or supplies owned and placed by and for said contractor upon said premises for the purpose of drilling a well for said Lessee.

(i) That Lessee will well and truly pay before delinquency all taxes and assessments levied or assessed against any personal property upon said premises which may be owned or placed thereon by

Lessee, and said Lessee will pay before delinquency seventy per cent (70%) of all taxes or assessments that may be assessed or levied upon or against said premises during the term of this lease in excess of taxes levied or assessed thereon for the year 1922, in so far as such excess is caused by the production or the discovery of oil or gas or other hydrocarbon substances in or on said premises.

(j) That Lessee will conduct and carry on his operations hereunder with the least possible damage and inconvenience to the farming or other uses of said premises as is consistent with the reasonable conduct of carrying on his operations as herein contemplated, and will not do or suffer damage to adjacent property or any adjacent premises of Lessors or either of them. Lessee will hold Lessors and each of them and said premises harmless against all damages, or claims or costs or expense for damages, which may be asserted by owners of adjacent lands or other persons by reason of the operations of Lessee hereunder or because of fire or the overflow or escaping of oil or gas or water or other [18] substances from said premises. Lessee will not suffer or permit any mechanic's lien to be enforced against Lessors or either of them or said premises or any part thereof by reason of any acts of, or operations done or suffered by Lessee, but will hold Lessors and each of them and said premises safe and harmless therefrom and from any and all costs and expenses incurred or suffered by Lessors and

each of them because of the filing of any such lien. Lessee will within thirty (30) days after the destruction by reason of his operations hereunder of any growing trees on said premises or any premises of Lessors or either of them pay to Lessors for each tree so destroyed as follows:

Orange trees	$100.00 each
Walnut trees	$100.00 each
Pine trees	$100.00 each
Gum trees	10.00 each;

and any gum shoot 20 feet high shall be deemed to be a tree for the purposes hereof.

Destruction in this paragraph shall be deemed to mean such injury by reason of operations of Lessee to such tree or trees as renders it unproductive or destroys its usefulness.

(k) That Lessee will continue and carry on such operations in every respect in accordance with all valid laws, rules and regulations adopted by the public authorities governing said operations.

(l) That Lessee will diligently operate and/or pump all producing wells on said premises and develop and handle said substances and products and the by-products thereof so as to secure the largest and best monthly returns in value therefrom, reasonably subject to market conditions and according to the customs and practices in that line of business.

(m) Lessee agrees to keep on said premises or at Los Angeles, California, accessible to Lessors, an

accurate log of the drilling of said well and any and every well drilled hereunder and a casing record thereof; and he will promptly upon demand allow Lessors or their representatives to inspect and make copies of such log and record at all reasonable times. [19]

(n) That Lessee will not release, sublet or assign this lease, or any part thereof or any rights or interest therein, nor shall the same in any manner pass or be transferred from Lessee by operation of law or by virtue of any legal proceedings, without the written consent of Lessors; and this provision shall also apply to each and every subsequent assignment or transfer hereunder and unless each and every subsequent transfer or assignment is consented to in writing by Lessors the same shall be void and without effect, and Lessee and each and every subsequent assignee and transferee of this lease or any rights or privileges hereunder, covenants and agrees to and with Lessors that such assignee or transferee or holder will not accept any interest or rights hereunder without the written consent of lessors first had and obtained therefor. Lessors hereby consent to Lessee assigning this lease to a corporation organized by him under the laws of the State of California, to be named "Elliott Petroleum Corporation" upon the condition however, that each and all of the terms and conditions of this lease, and all of the covenants and agreements on the part of the Lessee herein shall be binding upon and extend to

said assignee as well as said Lessee herein as fully as though said assignee were originally named as Lessee herein jointly with the original Lessee herein.

(o) Lessee covenants and agrees that if he should acquire any drilling rights or interest therein upon any contiguous or adjacent land he will not drill or operate any well thereon which shall be nearer than one hundred fifty (150) feet to any boundary line of the premises described in this lease.

3.

LESSORS HEREBY COVENANT AND AGREE TO AND WITH LESSEE AS FOLLOWS:

(a) That said Lessor Chauncey Dwight Clarke is the owner of said described land in fee simple, and that said land is free and clear of all encumbrances, except current taxes and rights of way, [20] or easements of record, and that said described land is registered in the name of said Lessor under and in accordance with the provisions of that certain Act adopted in 1915 by the people of California known as the "Land Title Law" or "Torrens Land Act", and that the number of the certificate of the premises registered thereof is A B 11903; and that contemporaneously with the execution and delivery of this lease Lessors will procure and deliver to Lessee a certificate duly issued by the Registrar of Title under said Act showing that the title to said described land at the time of the execution of this lease is vested in fee simple in said Lessor and that

said premises and the rights and privileges and easements herein defined are free and clear of all encumbrances, except current taxes and rights-of-way or easements of record; that Lessors will warrant and defend the said Lessee in the free and unrestricted enjoyment of his demise hereunder to the Lessee from any act or acts of any person claiming by, through or under said Lessors.

(b) That Lessors will pay or cause to be paid promptly before delinquency all taxes levied or assessed upon said premises except the taxes and assessments agreed to be paid by said Lessee.

4.

IT IS EXPRESSLY STIPULATED AND AGREED that in consideration of the performance of the covenants herein contained by him to be performed said Lessee shall have and he is hereby granted the following rights and privileges, to-wit:

(a) To construct, lay and maintain any and all derricks, pipe, telephone, water and electric lines, roads and ways, and to use and enjoy all reasonable roads and ways under and across any part of said premises, except said surface of said part thereof westerly of said cement wall, for the purpose of continuing and carrying on any of the operations herein contemplated, and to erect and maintain thereon reservoirs, tanks, and other containers for the purpose of holding, storing, or otherwise preserving any of the products by this lease contem-

plated to be produced or found or saved from said premises. [21]

(b) To remove from said premises all machinery, pipe and other lines, derricks, casing, improvements of every description and nature which may have been placed thereon or therein by him, except so far as such removal may be inconsistent with any of the provisions of this lease or the rights of Lessors hereunder and only in the event that Lessee is not in default under any of the terms or conditions or provisions of this lease.

(c) To use so far as the same may be required in the drilling operations hereunder any water or water rights appurtenant to said premises, whenever same is not wanted by Lessors, for sale or for use or for any purpose whatsoever now existing or hereafter arising or created, upon paying to Lessors the operating costs therefor and for the wear and tear on and damage to the pumping plant and machinery while operating same for his use.

(d) To suspend operations under this lease without prejudice to the rights granted hereunder when and for so long as the market value of the total oil, gas, and substances produced and saved hereunder shall not be more than the value of the settled oil of the kind and quality produced from said premises computed at fifty (50) cents per barrel at said premises.

(e) To continue this lease from and after said twenty (20) year term for so long thereafter as oil

or gas, or either of them are produced in paying quantities therefrom, unless otherwise forfeited by Lessee.

5.

AND IT IS FURTHER COVENANTED AND AGREED:

(a) That Lessors shall have the use and enjoyment of all said premises not required by Lessee for the conducting and carrying on the works as herein contemplated, provided, however, that same shall not be used in any manner for any oil operations of any kind by any person other than Lessee.

(b) That all work and operations hereunder shall be done and performed at the sole cost and expense of Lessee. That Lessors may post and keep [22] posted on said premises such notices as they may desire in order to protect Lessors, and each of the, and/or said premises against liens and any and all claims or damages or liabilities because of any act or acts of Lessee or his operations hereunder.

(c) That Lessors or their representatives may inspect and copy all books, logs, papers, records, work done and being done, and operations of Lessee in so far as the same may assist in the determination of the quantity, quality and value of the products, and by-products saved or produced or to be saved or produced from said premises, or whether Lessee

has duly performed or is performing each and every covenant of this lease.

(d) That Lessors may terminate this lease for the violation or the failure of Lessee to perform any of the terms, covenants, conditions or provisions thereof, upon giving the Lessee thirty (30) days' previous notice in writing of election so to terminate this lease in the event that Lessee does not within said thirty (30) days comply therewith; provided that Lessee shall not be entitled to more than ten (10) days' notice or demand before Lessors can terminate lease for failure of Lessee to pay or deliver any money or royalty at the times and as provided herein.

(e) That Lessors may upon the termination of this lease from any cause whatsoever purchase the derrick or casing or both in any well or wells, at the value thereof as they stand on said premises, less costs and expenses of removing the same therefrom, upon giving Lessee twenty (20) days' previous written notice of intention to make such purchase.

(f) That Lessors shall have, own and enjoy free of charge all water developed by operations hereunder and not required by Lessee for use in his operations hereunder.

(g) That for the purpose of this lease a well producing oil, in paying quantities is hereby defined as one which shall produce an average of at least fifty (50) barrels of oil per day for thirty (30) con-

secutive days immediately following completion or producing oil and substances during said period equivalent in value thereto. [23]

(h) Nothing herein contained shall be construed to authorize Lessee to maintain or operate any refinery or cracking plant upon said premises, except for casing-head gasoline at a point mutually agreed upon by Lessee and Lessors, or to maintain storage tanks, or reservoirs, or other structures or appliances thereon for oil or other substances other than that which may be produced upon said premises.

(i) Inability of the Lessee to comply with any provision or condition of this agreement by reason of strikes, unavoidable accident, fire, acts of God, action of the elements, war, insurrrection, rebellion, or by reason or interruption of transportation facilities by governmental action, or by any cause whatever beyond the control of the Lessee, if any such suspension of operations upon the part of the Lessee shall result directly from such cause, shall excuse the delay in the work or suspension thereof, but only to the actual extent of such interruption, and it shall be the duty of the Lessee to make every reasonable effort to overcome the difficulties or obstacles causing such delay and to resume work promptly when the cause of the interruption has ceased.

(j) The giving of any notice or the furnishing of any statement herein required to be given from

one party to the other, shall be by written statement, and the delivery of such written statement or notice upon the Lessors shall conclusively be taken as sufficient if left with Lessors or either of them personally at any place, or if sent by registered mail to said Lessors at Santa Fe Springs, California; any such notice or statement shall conclusively be taken as sufficient if left with Lessee personally at any place, or if sent by registered mail to said Lessee at 1016 California Building, Los Angeles, California.

(k) All ways, roads, tracks, reservoirs, tanks, pipe and other lines, and similar works and appliances shall, for the purpose of this lease, be taken and deemed as an appurtenance to each well being drilled or producing oil and/or gas, so long as and to the extent that they are used in the maintenance or construction of such well, or the handling or the storing of the products thereof. [24]

(l) The said well to be drilled on said premises shall be located approximately at the center of said premises at a point agreed upon by Lessors and Lessee, as hereinbefore provided, and Lessors shall not locate or drill, or suffer to be located or drilled, any well on any part of their remaining lands or premises within four hundred (400) feet of the said well located on the premises herein described; only one (1) well shall be drilled on said premises herein described unless Lessors otherwise consent in writing.

(m) Should the parties hereto be unable to agree as to any fact herein required by them to be determined, but not involving a construction of the true intent and meaning of this lease, nor an alteration or violation of its terms, then such question shall be determined by arbitration, as follows: Each party shall select a disinterested arbitrator, and these two shall endeavor to agree. Should they fail to agree, then these two shall within thirty (30) days after their appointment select a third disinterested arbitrator, and the decision of any two of the board of arbitration as thus constituted rendered within thirty (30) days after the appointment of said third arbitrator, shall be final and binding upon the parties.

(n) Because the drilling of various wells in the vicinity of said premises has developed gas in high pressure and gusher oil wells, Lessee shall use and take all reasonable precautions and means and care in drilling well or wells hereunder, and to produce and save all merchantable oil found or developed on said premises according to the best practices and custom in said district.

(o) Time is expressly understood to be of the essence of this contract.

(p) Upon the neglect or failure of Lessee after ten (10) days' previous notice from Lessors to perform any of the covenants, agreements or provisions of this lease on his part to be kept or performed, as to payment or delivery of money or royalty to Lessors, or either of them, then at the option of

Lessors, and as to all other covenants, agreements, and provisions, upon failure by Lessee to comply therewith after thirty (30) days' previous notice from Lessors, this lease and contract, and all rights, privileges [25] easements and interests created in Lessee hereunder shall absolutely cease and terminate, except only as to the right of removal of property therefrom as hereinbefore provided, and thereupon Lessors shall have the right to re-enter and repossess said premises and every part thereof, and remove all persons therefrom, and to hold and enjoy the same as of Lessors' first and former estate. Notice of forfeiture shall be in writing signed by Lessors or their representatives. Waiver of default at any time or in any case shall not constitute any waiver of any subsequent default.

(q) On the expiration of this lease by its terms or the sooner termination thereof by agreement or because of forfeiture, or for any cause whatsoever, Lessee shall quietly and peaceably surrender possession of said premises to Lessors, and shall so far as possible cover all sump holes and excavations made by Lessee, and restore said premises as nearly as possible to the condition in what it was received.

(r) The covenants herein contained shall bind, and inure to the benefit of, the heirs, administrators, successors, executors and assigns of the respective parties and of each of them hereto.

IN WITNESS WHEREOF, the parties hereto

have caused these presents to be duly executed in triplicate the day and year first hereinabove written.

(signed) CHAUNCEY DWIGHT CLARKE

" MARIE RANKIN CLARKE

" J. E. ELLIOTT

(Acknowledgments) [26]

(COPY)

EXHIBIT "B"

KNOW ALL MEN BY THESE PRESENTS:

That for valuable consideration the receipt and sufficiency whereof is hereby acknowledged, the undersigned, J. E. ELLIOTT and LILLIAN F. ELLIOTT, his wife, of Los Angeles, California, do hereby and by these presents, sell, assign, convey, transfer and set over unto ELLIOTT PETROLEUM CORPORATION, a corporation, that certain oil and gas lease dated June 13, 1922, executed by Chauncey Dwight Clarke and Marie Rankin Clarke, as lessors, to said J. E. Elliott as lessee, and registered on June 26, 1922, in Vol. AB, page 11093, as Document 25911, Records of Los Angeles County, California, and covering that certain real property situated in the County of Los Angeles, State of California, and described as follows:

A portion of the fractional Northeast quarter (NE¼) of the Northeast quarter (NE¼) of Section One (1), Township Three (3) South, Range Twelve

(12) West, of the Rancho Santa Gertrudes, subdivided for the Santa Gertrudes Land Association, as per map recorded in Book 1, page 520, of Miscellaneous Records, in the office of the Recorder of said County, described as beginning at the intersection of the southerly line of the Anaheim Telegraph Road with the East line of said Section One (1), thence south 0° 10' 15" East along said east line of Section One (1) 544.15 feet, thence North 63° 38' 35" West 491.39 feet, thence north 8° 42' 25" East 510.91 feet to the southerly line of the said Anaheim Telegraph Road, thence south 63° 38' 35" east along the said southerly line of the said Anaheim Telegraph Road 403.32 feet to the point of beginning, containing five (5) acres;

TO HAVE AND TO HOLD unto said Elliott Petroleum Corporation, its successors and assigns, forever. [27]

WITNESS our hands this 27th day of June, 1922.

J. E. ELLIOTT

LILLIAN F. ELLIOTT

State of California,
County of Los Angeles—ss.

On this.....day of June, 1922, before me, MAE S. MISKELL, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared J. E. Elliott and Lillian F. Elliott, known to me to be the persons whose names are subscribed to the within instru-

ment, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

MAE S. MISKELL
Notary Public in and for said County and State.

(Original recorded 10/9/22). [28]

EXHIBIT "C".

ASSIGNMENT OF OIL AND GAS LEASE

ELLIOTT PETROLEUM CORPORATION
A corp.
and
RICHFIELD OIL COMPANY
OF CALIFORNIA
ET AL.

AUGUST 17, 1928.

[29]

(THIS INSTRUMENT affects registered land last Certificate #EC-43395, Los Angeles County, California).

ASSIGNMENT
OF
OIL AND GAS LEASE

THIS INDENTURE made and entered into this 17th day of August 1928, by and between ELLIOTT

PETROLEUM CORPORATION, a corporation, party of the first part, and RICHFIELD OIL COMPANY OF CALIFORNIA, a Delaware corporation, party of the second part,

WITNESSETH:

THAT,

The party of the first part in consideration of $1.00 and other consideration, does hereby sell, assign, transfer and set over to the party of the second part, that certain oil development lease dated the 13th day of June, 1922, wherein CHAUNCEY DWIGHT CLARKE and MARIE RANKIN CLARKE, are the Lessors, and J. E. ELLIOTT is Lessee, was filed on, the 16th day of June, 1922 as Document #25911, with the Registrar of Land Titles, of the County of Los Angeles, California, and is now endorsed as a memorial on said Registrar's Certificate #EC-43395, and wherein and whereby the following described lands in the County of Los Angeles, State of California, were leased for oil development purposes, to-wit: [30]

A portion of the fractional northeast quarter (NE¼) of the Northeast quarter (NE¼) of Sec. One (1) Township 3 South, Range 12 West, of the Rancho Santa Gertrudes, subdivided for the Santa Gertrudes Land Association, as per map recorded in Book 1, page 502, Miscellaneous Records in the Office of the Recorder of said County, described as:

Beginning at the intersection of the southerly line of the Anaheim Telegraph Road with the east line of said Section 1, thence South 0° 10' 15" east along the said East line of Sec. 1, 544.15 feet thence north 63° 38' 35" West 491.39 feet; thence North 8° 42' 25" east 510.91 feet to the southerly line of the said Anaheim Telegraph Road, thence south 63° 38' 35" east along the said southerly line of the said Anaheim Telegraph Road 403.32 feet to the point of beginning, containing five (5) acres, situated in the County of Los Angeles, State of California;

in which said lease and the leasehold estate thereby created was assigned to ELLIOTT PETROLEUM CORPORATION by assignment from J. E. ELLIOTT to said ELLIOTT PETROLEUM CORPORATION, dated June 27, 1922, and filed and registered with the said Registrar of Land Titles as Document #29471, and endorsed upon the present outstanding Registrar's Certificate of title No. EC-43395, together with the leasehold estate created by said lease, and all the rights and privileges of the party of the first part thereunder, or by said lease granted to the Lessee therein named.

IN WITNESS WHEREOF, the party of the first part has hereunto caused its corporate name to be hereunto subscribed, and its corporate seal to be hereunto affixed by its President and Secretary [31] by a resolution of its Board of Directors thereunto

duly authorized, on the day and year first above written.

ELLIOTT PETROLEUM
CORPORATION,
By J. E. ELLIOTT,
President.
C. L. SHEETS,
Secretary.

State of California,
County of Los Angeles—ss.

On this 17th day of August 1928, before me RUTH T. DOOLITTLE, a Notary Public in and for the said County and State aforesaid, personally appeared J. E. ELLIOTT, known to me to be the President, and C. L. SHEETS known to me to be the Secretary of said ELLIOTT PETROLEUM CORPORATION, the corporation described in, and that executed the within instrument and they acknowledged to me that such corporation executed the within instrument and that they executed the within instrument for and on behalf of said corporation and as such officers thereof.

WITNESS my hand and official seal the day and year first above written.

RUTH T. DOOLITTLE
Notary Public in and for said County and State. [32]

KNOW ALL MEN BY THESE PRESENTS:

THAT I, MARIE RANKIN CLARKE, one of the Lessors named in the lease described in the fore-

going assignment, and the successor in interest of the other Lessor, CHAUNCEY DWIGHT CLARKE, now deceased, do hereby consent to and approve the foregoing assignment to RICHFIELD OIL COMPANY OF CALIFORNIA, a Delaware Corporation, upon the following express terms and conditions, to-wit:

FIRST: That the assignee shall not hereafter assign, mortgage or incumber the leasehold estate affected by said assignment without my consent in writing, or that of my successor in interest, if any,

SECOND: That the said assignee shall accept this assignment, and the conditions of this consent, in writing.

THIRD: That the giving of any notice or the furnishing of any statement required by said lease to be given by lessor to said assignee as lessee under said lease, shall be conclusively taken as sufficiently served if left with lessee personally at any place or if sent by Registered Mail to said assignee, as such lessee, at Bartlett Building, Los Angeles, California.

DATED: this 17th day of August 1928.

MARIE RANKIN CLARKE

State of California,
County of Los Angeles—ss.

On this 17th day of August 1928, before me, RUTH T. DOOLITTLE, a Notary Public in and

for the said County and State aforesaid, personally appeared MARIE RANKIN CLARKE to me known to be the person whose name is subscribed to, and who executed the within instrument, and she acknowledged to me that she executed the same.

WITNESS my hand and official seal.

RUTH T. DOOLITTLE

Notary Public in and for said County and State. [33]

KNOW ALL MEN BY THESE PRESENTS:

THAT, the undersigned, RICHFIELD OIL COMPANY OF CALIFORNIA, a Delaware Corporation, assignee named in the foregoing assignment, does hereby accept and agree to be bound by said assignment, and all the terms and conditions of said lease, and does hereby accept and agree to be bound by the conditions imposed in the foregoing consent to said assignment by MARIE RANKIN CLARKE, the surviving lessor in said lease name.

IN WITNESS WHEREOF, the aforesaid RICHFIELD OIL COMPANY OF CALIFORNIA has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed by its Vice-President and Secretary by resolution of its

Board of Directors thereunto duly authorized on the day and year next below written.

Dated this 17th day of August, 1928.

RICHFIELD OIL COMPANY OF CALIFORNIA

By JOHN McKEON
Vice President.

E. F. TAYLOR
Asst. Secretary.

State of California,
County of Los Angeles—ss.

On this 17th day of August, 1928 before me V. L. WEIDMAN, a Notary Public in and for said County and State, personally appeared JOHN McKEON, known to me to be the Vice President, and E. F. TAYLOR, known to me to be the Asst. Secretary of RICHFIELD OIL COMPANY OF CALIFORNIA the corporation described in and that executed the within instrument, and they acknowledged to me that such corporation executed the within instrument and they executed the within instrument for and on behalf of said corporation, and as such officers thereof.

WITNESS my hand and seal.

F. V. L. WEIDMAN
Notary Public in and for said County and State. [34]

EXHIBIT "D"

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS:

That ELLIOTT PETROLEUM CORPORATION, a corporation, for and in consideration of the sum of Ten Dollars ($10.00) lawful money of the United States in hand paid to it by Richfield Oil Company of California, a corporation, does by these presents bargain, sell, convey, assign and set over unto said Richfield Oil Company of California all that certain personal and/or physical equipment situated in the townsite of Santa Fe Springs, and upon property more particularly described as follows:

A portion of the fractional northeast quarter (NE¼) of the Northeast quarter (NE¼) of Sec. One (1), Township 3 South, Range 12 West, of the Rancho Santa Gertrudes, subdivided for the Santa Gertrudes Land Association, as per map recorded in Book 1, page 502, Miscellaneous Records in the Office of the Recorder of said County, described as:

Beginning at the intersection of the southerly line of the Anaheim Telegraph Road with the east line of said Section 1, thence South 0° 10' 15" east along the said East line of Sec. 1, 544.15 feet, thence north 63° 38' 35" West 491.39 feet; thence North 8° 42' 25" east 510.91 feet to the southerly line of the said Anaheim Telegraph Road, thence south 63° 38' 35" east along the said southerly line of the said Anaheim Telegraph Road 403.32 feet to

the point of beginning, containing five (5) acres, situated in the County of Los Angeles, State of California; [35]

and said Elliott Petroleum Corporation warrants and represents that it has complete and unquestioned title to said equipment and properties, and that it has the right to sell and convey the same as of this date. The property hereby conveyed is more particularly set forth in the attached Exhibit; said Exhibit shall be and is hereby declared to be a part of this instrument.

TO HAVE AND TO HOLD unto said Richfield Oil Company of California, its successors, or assigns forever.

ELLIOTT PETROLEUM CORPORATION

By J. E. ELLIOTT,
(signed) Pres.

By C. L. SHEETS,
(signed) Sec.

[36]

EXHIBIT

1	24x24x114 Wood Derrick	
1	Ross & Seeley Bull Wheel	13"x14'
1	" " " Calf Wheel	13"x7'6"
1	Pacific Oil Tool Hydraulic Pump	
1	Foamite Fire Extinguisher	2½ gal.
1	Foamite Fire Extinguisher	2½ gal.
1	Set O.W.S. Rig Irons	6 "
1	O.C.S. Counter Balance	

1	8 Ply Engine Belt		14"x95'
38'	Sprocket Chain		Size 1030
1	Emsco Crown Block		
	5 Mang Sheaves	26"	
	2 C. I. Sheaves	30"	
	5 I-Beams	5x12	
	4½" Gudgeons		
1	Marion Single Friction Sand Reel		5"x9'
1	Duro Gas Trap		
1	50 H.P. Western Machinery Gas Engine		
	Type G-17 R.P.M. 235 Bore 12¼"		
	Stroke 20"		
1	McCord Pressure Feed Lubricator		4 Quart
1	Western Machinery Centrifugal Pump		1¼"x1¼"
1	Liberty Air Compressor Type A.C.		
	Made by Air Compressor & Equipment Co.		
1	Corrugated Tank, W.P.S.		25 BBL.
1	Corrugated Tank, W.P.S. Cone Top		75 "
3	Titusville H.R.T. Boilers		70 H.P.
1	Gardner D.P.P. Pump		6x4x6
1	Gardner D.P.P. Pump		6x4x6
1	Corrugated Iron Boiler House		32'x48'
2	Holbrook Corrugated Iron Tanks		2500 Bbl.
1	Holbrook B.S. Tank		500 "
2	Holbrook Corrugated Iron Tanks		500 "
1	Holbrook B.S. Tank		25 "
1	40 Gal. Foam Cart. Recharged with hose		
150'	2½" Hose (Fire Hose) Mounted on hose cart		
1	Corrugated Iron Fire House Wood Floor		8'x12'
1	Corrugated Iron Tool House Cement Floor		8'x10'
1	Corrugated Iron Warehouse (Used 75%		
	Wrhse., 25% Garage)		33'x75'
1	Corrugated Iron Lab. House Cement Floor		12'x24'
1	4 Tube Braun Centrifuge ½ H.P.		
	110 Volts by 220 3 phase		
	60 Cycle Speed 1750 Serial #342822		
1	Cad. Roadster Type Truck License #286156		
	Eng. #A21208 First Sold 1916		
	Water well and equipment, dehydrator, fittings, etc.		[37]

EXHIBIT "E"

COLLATERAL AGREEMENT

ELLIOTT PETROLEUM CORPORATION,
a corporation
and
RICHFIELD OIL COMPANY OF CALIFORNIA
a corporation

August 17, 1928

[38]

COLLATERAL AGREEMENT

THIS AGREEMENT, made and entered into this 17th day of August, A.D. 1928, by and between ELLIOTT PETROLEUM CORPORATION, a CALIFORNIA Corporation, party of the first part, and RICHFIELD OIL COMPANY OF CALIFORNIA, a Delaware Corporation, party of the second part,

WITNESSETH:

THAT,

WHEREAS, the first party does hereby and by an instrument of even date herewith, assign to second party, that certain oil development lease, together with the leasehold estate hereby created and the rights and privileges therein granted, which said lease is dated June 13, 1922, and wherein CHAUNCEY DWIGHT CLARKE AND MARIE RANKIN CLARKE are Lessors, and one J. E. ELLIOTT is Lessee, and which said lease was filed on the 26th

day of June 1922, as Document No. 25,911, with the Registrar of Land Titles of the County of Los Angeles, State of California, and is now endorsed as a memorial on the present outstanding Registrar's Certificate No. EC-43,395, and

WHEREAS, said lease and leasehold estate and rights and privileges have by assignment been and now are, vested in the party of the first part, and

WHEREAS, as a part of this transaction and in connection therewith and for the same consideration, the party of the first part [39] does hereby and by a separate instrument of even date herewith, sell assign and transfer to the party of the second part, certain drilling equipment and personal property, reference to which assignment or bill of sale is hereby made for further particulars.

NOW THEREFORE, IT IS AGREED, by and between the parties hereto, with respect to said assignment and said bill of sale, as follows:

FIRST: That the consideration for said bill of sale and assignment of lease is the sum of Two Hundred seventy-five thousand ($275,000.00) dollars, of which the sum of one hundred thirty-seven thousand, five hundred ($137,500.00) dollars is paid in cash, the receipt of which is hereby acknowledged.

SECOND: That said assignment is accepted by the second party, subject to the following oil and gas sale contracts, to-wit:

(a) A contract for the sale and treatment of gas produced from the said demised premises by the

first party herein and by it with the Pacific Gasoline Company, and dated February 13, 1924, which said contracts the second party assumes and agrees to perform, but with the privilege of exercising any right of cancellation thereof, which the first party might now or hereafter be entitled to exercise.

THIRD: The second party agrees that it will, immediately upon the execution of this instrument, commence operations for the drilling of a new and additional oil well upon the demised premises and continue such operations and drilling diligently and continuously until the same are completed in the said deeper sand or oil measure recently discovered to exist below what is commonly known as the "Meyer Sand" in the Santa Fe Springs field; said deeper sand or oil measure will be herein referred to as the "deeper sand". [40]

FOURTH: The second party undertakes and agrees that it will until it has fully paid the balance of the purchase price herein referred to, comply with all the obligations and conditions of the original lease, as the same now exists and if the same shall be modified by an instrument executed concurrently herewith, and will protect such lease against violation or forfeiture, and that it will continuously and diligently produce oil and/or gas from said lease, and from all wells now or hereafter drilled thereon, so long as such lease produces any of the substances referred to or described in said original lease in quantities sufficient to pay to produce and save.

FIFTH: The term "deeper sand", when used in this agreement, shall be taken and deemed to be any oil or gas producing sand or strata below five thousand (5,000) feet or any such producing sand below and separated by an impervious strata from the present producing sand known as the Meyer sand, from which production is being had on the demised premises, but for the purposes of this agreement as to development in the first well herein provided for, such deeper sand must necessarily include penetration for testing purposes at its stratagraphic level under the demised premises of the sand from which what is commonly known as the Buckbee Well, drilled by Wilshire Oil Company, is now producing.

SIXTH: It is agreed that second party shall pay the balance of the purchase price above referred to, amounting to $137,500.00, out of one half of the net proceeds of all production from the demised premises. The term "net" as here used, shall apply to and be deemed to be the proceeds of all of the gross production of oil gas or other substances of value produced and saved after deducting therefrom the royalties provided for in the above lease or the modification thereof, hereinbefore referred to, and the amount thereof as fuel as provided in said lease and/or said modification.

Payments on account of the balance of the purchase price, statements affecting the same and rights of inspection shall be as are provided for in the lease above referred to and be governed by the rules and obligations therein specified as such lease now exists,

and/or as the same shall exist under said modification, respecting the payment of royalty under said lease, as to time, diligence and procedure.

The price, however, governing the payments to first party for the balance of the purchase price of oil and/or [41] gas, shall be the price as to oil which the Lessee therein named, shall pay to the Lessor therein named, (in the event that the Lessor shall elect to take royalties in cash or enter into a joint contract for the sale of oil) or the posted price of the Standard Oil Company for said Santa Fe Springs field for oil of like grade and quality, whichever shall be greater.

SEVENTH: Should the second party voluntarily surrender said lease, while and so long as said lease produces oil or gas or other of said substances in quantities sufficient to produce or save, or should the leasehold estate be lost by reason of the default of the party of the second part, or should the party of the second part remain in default for the period of fifteen days in the performance of any other of the terms or conditions of this agreement, direct or adopted, after written demand for such performance, then the balance of the purchase price shall become immediately due and payable and the same shall constitute a personal and direct obligation of the party of the second part to the party of the first part, anything in this instrument to the contrary notwithstanding.

EIGHTH: The Assignor hereby warrants to the Assignee that its title to the leasehold estate hereby

assigned, is free and clear of all liens, encumbrances and claims done, made or suffered by it, or its immediate Assignor, J. E. ELLIOTT, except those herein expressly referred to and assumed by the Assignee.

NINTH: The terms "drilling", "operations", and "Producing" when used in this agreement shall be deemed to be with a sufficiency of labor and material, first-class tools and equipment and in accordance with custom and good practice in the industry.

IN WITNESS WHEREOF, the respective parties hereto have caused these presents to be executed, in duplicate, and their respective corporate names to be hereunto subscribed and their respective corporate seals to be hereunto affixed, by their respective officers [42] thereunto duly authorized by resolution of their respective Boards of Directors, all on the day and year in this instrument first above written.

ELLIOTT PETROLEUM
CORPORATION
(Signed) By J. E. ELLIOTT
President
(Signed) C. L. SHEETS
Secretary
RICHFIELD OIL COMPANY OF CALIFORNIA
(Signed) By JOHN McKEON
Vice President
(Signed) E. F. TAYLOR
Asst. Secretary

[Endorsed]: Filed June 11, 1934. [43]

[Title of Court and Cause.]

Melvin D. Wilson, Esq. for the petitioner.

I. Graff, Esq, and E. G. Sievers, Esq., for the respondent.

MEMORANDUM OPINION.

ADAMS: This proceeding involves a proposed deficiency for the year 1930 in the amount of $1,045.29. The sole question presented is whether the amount of $69,699.81, received by petitioner out of oil in part payment for the assignment of certain oil and gas leases to the Richfield Oil Company, is subject to depletion. The case was submitted upon stipulation and exhibits attached thereto.

Petitioner is a corporation having its principal office and place of business at Los Angeles, California. It filed a corporation income tax return for the calendar year 1930 with the Collector of Internal Revenue for the Sixth District of Los Angeles, California.

On or about June 13, 1922, J. E. Elliott leased certain oil bearing land in the County of Los Angeles from Chauncey Dwight Clarke and Marie Rankin Clarke. A copy of said lease is included herein by reference. [44]

On the 27th day of June, 1922, J. E. Elliott and Lillian F. Elliott, his wife, assigned all their right, title and interest in and to the said Clarke lease to the petitioner. A copy of said assignment is included herein by reference.

On August 17, 1928, the petitioner entered into an agreement with the Richfield Oil Company of California, transferring said lease to the Richfield Oil Company. This agreement, called "Assignment of Oil and Gas Lease," is included herein by reference.

On August 17, 1928, the petitioner entered into an agreement with the Richfield Oil Company of California designated "Bill of Sale," which agreement is included herein by reference. Under this agreement the petitioner sold to the Richfield Oil Company certain personal and/or physical equipment designated therein and situated upon the leasehold property assigned by petitioner to the Richfield Oil Company on the same date as set out above.

On August 17, 1928, the petitioner entered into an agreement with the Richfield Oil Company of California designated "Collateral Agreement," which is included herein by reference. This agreement provides in part as follows:

> WHEREAS, the first party does hereby and by an instrument of even date herewith, assign to second party, that certain oil development lease, together with the leasehold estate hereby created and the rights and privileges therein granted, which said lease is dated June 13, 1922, and wherein Chauncey Dwight Clarke and Marie Rankin Clarke are Lessors, and one J. E. Elliott is Lessee, * * *.
>
> * * * * * *
>
> WHEREAS, as a part of this transaction in connection therewith and for the same consid-

> eration, the party of the first part does hereby and by a separate instrument of even date herewith, sell, assign and transfer to the party of the second part, certain drilling equipment and personal property, reference to which assignment or bill of sale is hereby made for further particulars. [45]

The consideration was $275,000, of which the sum of $137,500 was to be paid in cash and the balance of the purchase price amounting to $137,500 was to be paid "out of one-half of the net proceeds of all production from the demised premises." It was further provided as follows:

> Should the second party voluntarily surrender said lease, while and so long as said lease produces oil or gas or other of said substances in quantities sufficient to produce or save, or should the leasehold estate be lost by reason of the default of the party of the second part, or should the party of the second part remain in default for the period of fifteen days in the performance of any other of the terms or conditions of this agreement, direct or adopted, after written demand for such performance, then the balance of the purchase price shall become immediately due and payable and the same shall constitute a personal and direct obligation of the party of the second part to the party of the first part, anything in this instrument to the contrary notwithstanding.

Petitioner received in 1928 from the Richfield Oil Company of California, on account of said agreement, the cash consideration of $137,500 mentioned in said agreement plus $19,494.58 on account of the balance of consideration mentioned in said agreement, or an aggregate amount of $156,994.58. In 1929 petitioner received $35,797.68 on account of the balance of the consideration mentioned in said agreement. At the time of petitioner's said agreements with the Richfield Oil Company of California, petitioner's unrecovered capital cost of the said Clarke lease was $38,272.53. In the final determination of petitioner's tax liability for 1928 the Commissioner deducted said unrecovered capital cost from the said amount of $156,994.58 in arriving at the taxable net profit from the transaction. [46]

The agreement between the petitioner and the Richfield Oil Company of California was carried out in all respects from its date through December 31, 1930. Petitioner received from the Richfield Oil Company of California in 1930, on account of said agreement, the sum of $69,699.81.

If petitioner is entitled to a deduction from said gross income of $69,699.81 for depletion, the amount of such deduction shall be $19,167.44 which is 27½ per cent of the said $69,699.81.

This case does not differ in principle from Chester Addison Jones, 31 B.T.A. 55, wherein we held that where a taxpayer transferred all his interest in certain oil rights for cash and part of the proceeds from

the sale of the oil if, as and when produced he retained an economic interest in the oil and was entitled to a deduction for depletion on the deferred payments which he received from the proceeds of the oil.

As we read the collateral agreement in this case the petitioner is entitled to receive the deferred amount of $137,500 only from the production of oil unless there is a default on the part of the second party. In case of such default and in such case only does the balance of the purchase price become a direct and personal obligation of the second party. Since there has been no default, under the agreement, by the second party we may not speculate as to such contingency but must consider the case under the facts as they existed in the taxable year.

There is no question but that the amount in dispute was received by petitioner under the terms of his agreement with the Richfield Oil Company and represented payments from the proceeds the oil produced in the taxable [47] year. We think petitioner is entitled to a deduction for depletion of 27½ per cent of the $69,699.81 under the Revenue Act of 1928. Chester Addison Jones, supra; William Fleming, 31 B.T.A., Report No. 127, promulgated November 16, 1934; cf. Palmer v. Bender, 287 U.S. 551.

Decision will be entered for the petitioner.

Enter:

[Endorsed]: Entered Jan. 2, 1935. [48]

United States Board of Tax Appeals
Washington

Docket No. 71769.

ELLIOTT PETROLEUM CORPORATION,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered January 2, 1935, it is

ORDERED and DECIDED: That there is no deficiency for the year 1930.

[Seal] (Signed) ANNABEL MATTHEWS

Member.

Enter:

[Endorsed]: Entered Jan. 3, 1935. [49]

In the United States Circuit Court of Appeals for the Ninth Circuit.

Docket No. 71769.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

ELLIOTT PETROLEUM CORPORATION,

Respondent.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and I. Graff, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States; that Elliott Petroleum Corporation, the respondent on review, hereinafter called the respondent, is a corporation having its principal office and place of business at Los Angeles, California; that the income tax return of said corporation for the calendar year

1930, the year here involved, was filed with the Collector of Internal Revenue for the Sixth District of California, and that the office of said Collector is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit. [50]

II.

The Commissioner determined a deficiency in income tax against the respondent for the year 1930 in the amount of $1,045.29 and on March 8, 1933 sent to it by registered mail notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928. Thereafter on May 1, 1933 the respondent filed an appeal from said notice of deficiency with the United States Board of Tax Appeals.

On June 11, 1934 the case was submitted to the Board of Tax Appeals for its decision at an oral hearing on a stipulation of facts. On January 2, 1935 the Board promulgated a memorandum opinion and on January 3, 1935 the Board entered its decision and order of redetermination in accordance with its opinion wherein and whereby it ordered and decided that there is no deficiency in income tax owing by the respondent for the year 1930.

III.

The nature of the controversy is as follows, to-wit:

The sole question involved is whether the respondent is entitled to a depletion deduction of 27½% of the amount of $69,699.81 received by it in 1930 out of the net proceeds of certain oil production.

On or about June 13, 1922 one J. E. Elliott leased certain oil bearing land in the County of Los Angeles from Chauncey Dwight Clarke and Marie Rankin Clarke. On June 17, 1922 said Elliott and his wife, Lillian F. Elliott, assigned all their right, title and interest in and to the said Clarke lease to the respondent. On August 17, 1928 the respondent sold, assigned, transferred and set over to the Richfield Oil Company of [51] California said lease and the appurtenant drilling equipment and personal property for the sum of $275,000.00, of which the sum of $137,500.00 was paid in cash at the time of the agreement. The balance of the consideration, amounting to $137,500.00, was to be paid "out of one-half of the net proceeds of all production from the demised premises". The respondent received the following sums on account of the balance of the purchase price:

1928	$19,494.58
1929	$35,797.68
1930	$69,699.81

Before the Board of Tax Appeals, the respondent claimed the right to a deduction for depletion of $19,167.44, which amount represents 27½% of $69,699.81, the payment received in 1930 on account of the balance of the purchase price. The petitioner, the Commissioner of Internal Revenue, contended that the payments received out of the proceeds of production were not subject to an allowance for depletion.

The Board of Tax Appeals sustained the contention of the respondent holding that the payments received out of the proceeds of production were subject to depletion.

IV.

The petitioner's assignments of error are as follows, to-wit:

1. The Board of Tax Appeals erred in holding that the amount of $69,699.81, received by the respondent in 1930 out of the proceeds of oil production in part payment for the assignment of a certain oil and gas lease and the appurtenant equipment and personal property, is subject to depletion. [52]

2. The Board erred in holding that respondent was entitled to a deduction for depletion of $19,167.44, representing 27½% of $69,699.81.

3. The Board erred in redetermining the respondent's tax liability and deciding that there was no deficiency for the year 1930.

4. The Board erred in failing to hold that respondent was not entitled to a deduction for depletion on said amount of $69,699.81.

5. The Board erred in failing to approve the deficiency in tax for the year 1930 as determined by the petitioner.

6. The Board erred in not rendering judgment for the petitioner for the reason that any other judgment was not supported by any competent and substantial evidence nor according to law.

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with law and with the rules of said Court, and transmitted to the Clerk of said Court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN
Assistant Attorney General.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the Bureau of Internal Revenue.

OF COUNSEL:
I. GRAFF,
Special Attorney,
Bureau of Internal Revenue. [53]

United States of America,
District of Columbia—ss.

I. GRAFF, being duly sworn, says that he is a special attorney in the Office of the Assistant General Counsel for the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to mat-

ters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) I. GRAFF

Sworn and subscribed to before me this 18 day of March, 1935.

(Sgd.) GEORGE W. KREIS

Notary Public.

My commission expires Nov. 16, 1937.

[Endorsed]: Filed Mar. 19, 1935. [54]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: Elliott Petroleum Corporation, 417 South Hill Street, Los Angeles, California. Melvin D. Wilson, Esq., Title Insurance Building, Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did on the 19th day of March, 1935, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy

of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of March, 1935.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25 day of March, 1935.

ELLIOTT PETROLEUM CORPORATION

(Sgd.) By J. E. ELLIOTT Pres
Respondent on Review.

(Sgd.) MELVIN D. WILSON
Attorney for Respondent on Review.

[Endorsed]: Filed Mar. 30, 1935. [55]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Ap-

peals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries of the proceedings before the Board.

2. Pleadings before the board,

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Agreed statement of facts, including exhibits A to E, inclusive, made a part of the agreed statement.

4. Memorandum opinion of the Board.

5. Decision of the Board.

6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of the petition for review. [56]

7. This praecipe, together with proof of service of notice of filing praecipe and of service of a copy of praecipe.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the Bureau of Internal Revenue.

[Endorsed]: Filed Apr. 11, 1935. [57]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE FOR RECORD.

To: Elliott Petroleum Corporation, 4731 East 52nd Drive, Los Angeles, California. Melvin D. Wilson, Esq., Title Insurance Building, Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 11th day of April, 1935, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a Praecipe for Record. A copy of this praecipe as filed is hereto attached and served upon you.

Dated this 11th day of April, 1935.

ROBERT H. JACKSON
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of praecipe for record, is hereby acknowledged this 16th day of April, 1935.

ELLIOTT PETROLEUM CORPORATION
By F. C. MERRITT,
Vice President.
Respondent on Review.

MELVIN D. WILSON,
Attorney for Respondent on Review.

[Endorsed]: Filed May 13, 1935. [58]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 58, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of June, 1935.

[Seal] B. D. GAMBLE
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 7892. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Elliott Petroleum Corporation, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed June 11, 1935.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7892

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ELLIOTT PETROLEUM CORPORATION, RESPONDENT

ON PETITION FOR REVIEW OF DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.

INDEX

CITATIONS

34061—35——1

Statute:

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7892

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ELLIOTT PETROLEUM CORPORATION, RESPONDENT

ON PETITION FOR REVIEW OF DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 52–56), which is unreported.

JURISDICTION

The appeal involves a deficiency in income tax for the year 1930, in the amount of $1,045.29, and is taken from a decision of the Board of Tax Appeals, entered January 3, 1935 (R. 57). The case is brought to this Court by petition for review filed March 19, 1935 (R. 58–63), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of

1932, as amended by Section 1001 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 519 of the Revenue Act of 1934, c. 277, 48 Stat. 680.

QUESTION PRESENTED

The taxpayer sold and assigned an oil and gas lease which it acquired from the lessees of the property, together with certain drilling equipment and personal property, for the flat sum of $275,000, of which $137,500 was to be paid in cash and $137,500 was to be paid " out of one-half of the net proceeds of all production from the demised premises ", with the proviso that if the assignee should surrender the lease or default, then the latter sum should immediately become due and payable and should become the personal and direct obligation of the assignee. The question is whether the taxpayer is entitled to the percentage depletion allowance of 27½ percent with respect to a deferred payment of $69,699.81, received in 1930.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra,* pp. 20–26.

STATEMENT

The following facts are taken from the Board's memorandum opinion and from the documentary evidence which were incorporated in the Board's memorandum opinion by reference.

The taxpayer is a corporation, having its principal place of business in Los Angeles, California,

and it filed its return for 1930 in the Sixth Collection District of California (R. 52).

On June 13, 1922, J. E. Elliott secured an oil and gas lease of certain land in Los Angeles County from Chauncey Dwight Clarke and Marie Rankin Clarke, for a period of 20 years (R. 12–34, 52). The lessee agreed to drill a well of a certain character before August 1922 (R. 15). The lessee agreed to pay the lessors $8,000 in cash for the right to drill, to pay $16,000 out of oil and gas produced, together with 30 percent of the oil and gas produced, either in kind or in cash, after the allowance of certain expenditures; and if casing head gas should be produced, 30 percent of the prevailing market price therefor at the well less cost of manufacture (R. 17–20).

The lease was subject to cancellation if oil or gas was not produced in paying quantities, or for default (R. 16, 29). The lessee also agreed to pay certain taxes and assessments (R. 21–22), and there are other provisions which are not very material to this controversy.

On June 27, 1922, Elliott and his wife sold and assigned this lease to the Elliott Petroleum Corporation, the taxpayer, for "a valuable consideration", the nature of which was not described in the assignment (R. 34–36).

On August 17, 1928, the taxpayer in turn sold and assigned the lease to the Richfield Oil Company of California, for a "consideration of $1.00 and other consideration" (R. 36–39). This assignment

was approved by the lessors, subject to certain conditions, which were accepted by the assignee (R. 39–42).

On the same day (August 17, 1928), by bill of sale, the taxpayer sold to the Richfield Oil Company all the personal property and equipment on the lease "in consideration of the sum of Ten Dollars ($10.00) lawful money of the United States" (R. 43–44). A list of these assets was included in the bill of sale (R. 44–45).

Also on the same day, a collateral agreement referring both to the assignment of the lease and the bill of sale was executed by the taxpayer and the Richfield Oil Company (R. 46–51).

This agreement provided that the assignee would drill a new well, would perform a certain contract with the Pacific Gasoline Company and that it would pay $275,000 in consideration of the assignment of the lease and bill of sale, of which $137,500 was to be paid in cash (R. 47–48).

This collateral agreement provided further (R. 49–50):

> SIXTH: It is agreed that second party shall pay the balance of the purchase price above referred to amounting to $137,500.00, out of one half of the net proceeds of all production from the demised premises. The term "net" as here used, shall apply to and be deemed to be the proceeds of all of the gross production of oil gas or other substances of value produced and saved after deducting

therefrom the royalties provided for in the above lease or the modification thereof, hereinbefore referred to, and the amount thereof as fuel as provided in said lease and/or said modification.

Payments on account of the balance of the purchase price, statements affecting the same and rights of inspection shall be as are provided for in the lease above refered to and be governed by the rules and obligations therein specified as such lease now exists, and/or as the same shall exist under said modification, respecting the payment of royalty under said lease, as to time, diligence, and procedure.

The price, however, governing the payments to first party for the balance of the purchase price of oil and/or gas, shall be the price as to oil which the Lessee therein named, shall pay to the Lessor therein named (in the event that the Lessor shall elect to take royalties in cash or enter into a joint contract for the sale of oil) or the posted price of the Standard Oil Company for said Sante Fe Springs field for oil of like grade and quality, whichever shall be greater.

SEVENTH: Should the second party voluntarily surrender said lease, while and so long as said lease produces oil or gas or other of said substances in quantities sufficient to produce or save, or should the leasehold estate be lost by reason of the default of the party of the second part, or should the party

> of the second part remain in default for the period of fifteen days in the performance of any other of the terms or conditions of this agreement, direct or adopted, after written demand for such performance, then the balance of the purchase price shall become immediately due and payable and the same shall constitute a personal and direct obligation of the party of the second part to the party of the first part, anything in this instrument to the contrary notwithstanding.
>
> * * * * *

In 1928, the taxpayer received from the Richfield Oil Company the cash consideration of $137,500 mentioned in the agreement, plus $19,494.58 on account of the deferred payment, or a total of $156,994.58. In 1929, it received $35,797.68, and in 1930, $69,699.81 (R. 55).

In 1928 the Commissioner determined that the taxpayer realized a profit from the sale of its lease, measured by the difference between the sum of $156,994.58 received in that year and the sum of $38,272.53, representing its unrecovered capital cost of the lease and advised the taxpayer that subsequent payments would be taxed in full (R. 7). He disallowed the depletion claimed in 1930, equal to 27½ percent of the deferred payment of $69,699.81 received in that year, and determined a deficiency of $1,045.29 (R. 8, 55).

Upon appeal, the Board overruled the Commissioner's determination, holding that there was no deficiency.

SPECIFICATION OF ERRORS TO BE URGED

We urge that the Board erred:

1. In holding that the amount of $69,699.81, received by the taxpayer in 1930, out of the proceeds of oil production in part payment for the assignment of the lease and for the personal property and equipment is subject to depletion.

2. In holding that the taxpayer was entitled to a deduction for depletion of 27½ percent of $69,699.81.

3. In failing to approve the deficiency determined by the Commissioner.

4. In not rendering judgment for the Commissioner for the reason that any other judgment was not supported by any competent and substantial evidence, nor according to law.

SUMMARY OF ARGUMENT

Section 114 (b) (3) of the Revenue Act of 1928, *infra,* provides that the allowance for depletion in the case of oil and gas wells shall be 27½ percent of the "gross income from the property during the taxable year", but that it shall not exceed 50 percent of the net income of the taxpayer from the property and shall not be less than the allowance would be if computed without reference to that paragraph.

It is well settled that the phrase "gross income from the property" means gross income from the wells and that when the allowance is determined it

must, in the case of a lease, be divided equitably between the lessor and the lessee.

In this case the taxpayer parted with all of its right, title, and interest in an oil and gas lease and as part of the same agreement sold its personal property on the lease for a total consideration of $275,000, one-half to be paid in cash and one-half "out of the net proceeds of all production from the demised premises."

The payment of $69,699.81 received during 1930 was a deferred payment under the clause just quoted.

It is our position that the taxpayer retained no royalty or other economic interest in the oil and gas in place and is not entitled to a depletion allowance.

While the Supreme Court has held that the statutes authorizing depletion deductions are broad enough to allow a deduction for depletion in every case in which the taxpayer has retained an economic interest (as distinguished from a purely legal interest) in the oil and gas in place, it has held that one must have an economic interest in the oil and gas to be entitled to depletion.

In this case the taxpayer did not retain any right to share in the oil produced and had no interest in the oil in place. It sold its entire interest in the oil and gas for a cash payment and an additional sum which was to be paid from *net proceeds* of the sale of oil, if oil was produced and sold. This was

not a royalty interest or any economic interest in the oil and gas in place.

To hold otherwise would be contrary to the whole theory of depletion as the allowance of a loss realized through the exhaustion of the product. This taxpayer suffers no loss through the exhaustion of oil and gas through production. It is entitled to a fixed sum which is payable if the oil and gas is produced. Extraction does not reduce the amount.

The loss in question falls upon the assignee.

By the very terms of the statute here involved the depletion allowance cannot be computed with reference to net proceeds of the sale of oil and gas. The deduction allowed is a percentage of gross income from the well.

If the taxpayer were allowed the depletion claimed, the amount allowed would have to be deducted from the depletion allowed the assignee and the lessor. Yet they are the only ones who are gradually losing their capital as the well is exhausted.

ARGUMENT

The taxpayer had no royalty or other economic interest in the oil and gas in place and is not entitled to an allowance for depletion based on deferred cash payments received for the assignment of its lease and the sale of the personal property situated thereon

Section 23 (1) of the Revenue Act of 1928, *infra,* provides for the deduction of a reasonable allowance for depletion of oil and gas wells which, in the case of leases, is to be equitably apportioned be-

tween the lessor and lessee. Section 114 (b) (3), *infra,* provides that the allowance shall be "27½ percent of the gross income from the property during the taxable year", but that it shall not exceed 50 percent of the net income of the taxpayer from the property and shall not be less than the allowance would be if computed without reference to that paragraph.

It is well settled that the phrase "gross income from the property" means gross income from the wells. *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312; *Greensboro Gas Co.* v. *Commissioner* (C. C. A. 3d), decided September 18, 1935, not officially reported but found in 1935 C. C. H., Vol. 3–A, p. 10429; *Consumers Natural Gas Co.* v. *Commissioner,* 78 F. (2d) 161 (C. C. A. 2d); *Darby-Lynde Co.* v. *Alexander,* 51 F. (2d) 56 (C. C. A. 10th), certiorari denied, 284 U. S. 666. See also *Brea Cannon Oil Co.* v. *Commissioner,* 77 F. (2d) 67 (C. C. A. 9th); *Macon Oil & Gas Co.* v. *Commissioner,* 23 B. T. A. 54; *Fritz* v. *Commissioner,* 28 B. T. A. 408. Moreover, when the allowance is determined it must, in the case of a lease, be divided equitably between the lessor and the lessee. *Helvering* v. *Twin Bell Syndicate, supra.*

In the instant case the taxpayer parted with all of its right, title, and interest in the oil and gas lease and as part of the same agreement, sold its personal property for a total consideration of $275,000, one-half to be paid in cash at once and the

balance to be paid " out of one-half of the net proceeds of all production from the demised premises."

During the year 1930, the taxable year here involved, the taxpayer received a cash payment of $69,699.81 as a deferred payment under the clause just quoted, and the Board held that under Section 114 (b) (3), *infra,* it was entitled to a depletion allowance equal to 27½ percent of that amount.

We submit that the taxpayer retained no royalty or other economic interest in the oil in place and that the Board clearly erred in holding that an assignor of a lease so situated is entitled to a depletion allowance under Section 114 (b) (3), *infra.*

In holding otherwise, the Board relied upon its prior decision in *Jones* v. *Commissioner,* 31 B. T. A. 55, now pending on appeal before the Circuit Court of Appeals for the Fifth Circuit, and in its decision in that case it relied upon the decision of the Supreme Court in *Palmer* v. *Bender,* 287 U. S. 551.

The *Palmer* case arose under an earlier statute which did not provide for percentage depletion deduction and involved the question whether two lessees who transferred their operating rights to two oil companies for a present payment in cash, a payment of $1,000,000 "out of one-half of the first oil produced and saved" and an additional "excess royalty" of one-eighth of all the oil produced and saved was entitled to a deduction for depletion. The Government argued that the owners of the

leases sold and assigned them instead of executing subleases and hence that they had retained no legal interest in the mineral property which entitled them to a depletion allowance. The Supreme Court rejected that argument, holding that it was immaterial whether the transactions effected sales or subleases and that the language of the statutes was broad enough to allow a deduction for depletion in every case in which the taxpayer had secured an economic interest (as distinguished from a purely legal interest) in the oil and gas in place, and retained such an interest upon transfer or assignment of the leasehold to another.

That the Supreme Court insisted upon the retention of an economic interest in the property by the transferors and that it relied upon the reservation of royalty as establishing such interest in that case is clear. The Court said in part (pp. 557–558):

> Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough if, by virtue of the leasing transaction, he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. See *Burnet*

v. *Harmel, supra; Bankers Pocahontas Coal Co.* v. *Burnet, ante* p. 308.

In the present case the two partnerships acquired, by the leases to them, complete legal control of the oil in place. Even though legal ownership of it, in a technical sense, remained in their lessor, they, as lessees, nevertheless acquired an economic interest in it which represented their capital investment and was subject to depletion under the statute. *Lynch* v. *Alworth-Stephens Co., supra.* When the two lessees transferred their operating rights to the two oil companies, whether they became technical sublessors or not, they retained, by their stipulations for royalties, an economic interest in the oil, in place, identical with that of a lessor. *Burnet* v. *Harmel, supra; Bankers Pocahontas Coal Co.* v. *Burnet, supra.* Thus, throughout their changing relationships with respect to the properties, the oil in the ground was a reservoir of capital investment of the several parties, all of whom, the original lessors, the two partnerships and their transferees, were entitled to share in the oil produced. Production and sale of the oil would result in its depletion and also in a return of capital investment to the parties according to their respective interests. The loss or destruction of the oil at any time from the date of the leases until complete extraction would have resulted in loss to the partnerships. Such an interest is, we think, included within the meaning and purpose of the statute permitting deduction in the case

> of oil and gas wells of a reasonable allowance for depletion according to the peculiar conditions in each case.

The taxpayer in this case did not retain any right to share in the oil produced and had no interest in the oil in place, so that it is not entitled to a depletion allowance under the rule laid down in *Palmer* v. *Bender, supra.*

The taxpayer did not reserve any overriding royalty as was the case there. The right to a payment of the second half of the $275,000, out of one-half of the *net proceeds* of all production from the demised premises, was not a royalty within the usual definition of the term, as a share in the oil produced. *Bellport* v. *Harrison,* 123 Kan. 310; *Leydig* v. *Commissioner,* 43 F. (2d) 494 (C. C. A. 10th); Thornton, Oil and Gas, 5th Ed., Vol. 2, pp. 644–645. A royalty reserved by an assignee of a lessee is usually termed an overriding royalty. In Mills and Willingham's Law on Oil and Gas, p. 184, the term "overriding royalty" is defined as follows:

> An "overriding royalty" is a given percentage of the gross production payable to some person other than the lessor or persons claiming under him. It occurs where some owner of a working interest contracts to deliver a part of the gross production to another, usually his assignor. Such contracts are most frequently found as a reservation in an assignment of a lease. The provision creates in the owner of such royalty an interest in the lease, cannot be transferred or surrendered except with the same formali-

> ties necessary for a transfer of the lease, and is binding upon subsequent assignees of the lease, except innocent purchasers.

See also *Comar Oil Co.* v. *Burnet,* 64 F. (2d) 965 (C. C. A. 8th), certiorari denied, 290 U. S. 652.

The taxpayer in this case did not retain any interest in production. It was only in the event that oil was produced and *sold* that it would receive any additional sum by way of consideration for the sale of the lease above that which was paid in cash at the time that the transfer was made. The additional sum, moreover, was to be paid only out of the net proceeds of the sale. There was not even a lien on production for the payment of the amount.

We believe that the case is no different from what it would be if the entire sum of $275,000 had been paid on the transfer. In *Darby-Lynde Co.* v. *Alexander, supra,* the taxpayer who had made a sale of oil property during the taxable year for a single cash payment argued that he should be allowed to deduct 27½ percent of the amount received as a deduction for depletion under Section 204 (c) (2) of the Revenue Act of 1926, which is identical with Section 114 (b) (3) of the Revenue Act of 1928, here involved. The Court rejected that argument, holding that the phrase "gross income from the property" meant gross income from production.

The same conclusion was reached in *Pugh* v. *Commissioner,* 49 F. (2d) 76 (C. C. A. 5th), certiorari denied, 284 U. S. 642, where the taxpayer

assigned one-half of his royalty interest for a consideration of $250,000, of which $50,000 was payable at once and $200,000 out of future production of oil. That case, however, is perhaps weaker than the instant case, because there the taxpayer did not sell his entire royalty interest.

That the deferred payment in this case was not a reserved royalty is also supported by *Comar Oil Co.* v. *Burnet, supra,* although that case did not involve a question of depletion. In that case the taxpayer secured a lease of certain oil land for a consideration of $50,000 in cash and $100,000 to be paid out of one-eighth of the gross production of oil and gas, a second lease for which $100,000 was payable in cash and the balance out of one-half of the oil produced, and a third lease for a consideration of $3,000,000, of which $1,750,000 was payable in cash and the balance out of one-half of the oil produced. The taxpayer claimed the right to deduct the payments made out of oil under these leases as deductions from gross income on the ground that they were royalties. The Court held that the payments were not royalties but capital expenditures made in connection with the acquisition of capital assets.

Attention is called to the fact that certiorari was denied in that case after the decision in *Palmer* v. *Bender, supra.*

If the payments made by the assignee in that case were not royalties but capital expenditures, then to the assignor they constituted receipts from the sale of property and not royalties. Much less were the

deferred payments royalties in this case, where they were to be paid out of the net proceeds from production.

We think it clear that the deferred payments cannot be assimilated to a bonus which is in the nature of an advance payment of royalties reserved for oil to be extracted normally and involves a return of the taxpayer's investment in the oil in place. *Burnet* v. *Harmel,* 287 U. S. 103; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299. Hence the fact that depletion is allowed with respect to a bonus (*Herring* v. *Commissioner,* 293 U. S. 322), furnishes no justification for allowing the selling price of an outright disposition of oil property, without reservation of a royalty or other economic interest in the oil itself, to form the basis of a depletion allowance.

To hold otherwise is contrary to the reasoning of the Court in *Palmer* v. *Bender, supra,* and contrary to the whole theory of depletion as the allowance of a loss realized through the exhaustion of the product.

This taxpayer suffers no loss through the exhaustion of oil and gas through production. Under its contract it might have failed to receive income it expected to receive because the mineral content was not there at all. But extraction would not cause a gradual reduction in the amount it was entitled to receive out of that production.

The fundamental purpose of the depletion statutes, both before and subsequent to the enactment

of the percentage depletion provisions has been to return to the taxpayer a reasonable allowance for the exhaustion of his interest in the property caused by the depletion of his natural resource during the taxable year. *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364; *Palmer* v. *Bender, supra; Night Hawk Leasing Co.* v. *Burnet*, 57 F. (2d) 612 (App. D. C.); *Greensboro Gas Co.* v. *Commissioner, supra.*

We submit that the loss in this case falls on the assignee who is operating the property and is entitled to the gross income from production, except insofar as it is divided with the owner (lessor). It should be remembered that only one allowance is granted. Where the operator pays a royalty to one retaining an economic interest, he and the recipient of the royalty together can claim a deduction equal to 27½ percent of the gross income from the well. *Helvering* v. *Twin Bell Syndicate, supra.*

Not only is one having no economic interest in the oil and gas in place not entitled to depletion, but under the very terms of the statute here involved the depletion allowance cannot be computed where the interest is a certain sum to be paid out of *net proceeds* from production and sale of oil. The deduction is based on the gross income from the well.

For that reason, it has been held that where some manufacturing process, or other service, is performed by one having an interest in production, before the product of the well is sold, the depletion

allowance must be based on the market value of the product at the mouth of the well. *Brea Cannon Oil Co.* v. *Commissioner, supra; Consumers Natural Gas Co.* v. *Commissioner, supra; Greensboro Gas Co.* v. *Commissioner, supra; Signal Gasoline Corp.* v. *Commissioner,* 66 F. (2d) 886, 77 F. (2d) 728 (C. C. A. 9th).

This taxpayer is seeking to claim a deduction not based on gross income from the well, but on a deferred, fixed payment for the property, made out of the net proceeds of the sale of the product. The assignee could claim no deduction for the payment as royalties under the *Comar* case, *supra,* but if the taxpayer is allowed a deduction for depletion based on it, the assignee must reduce the gross income from the property by that amount and will get only 27½ percent of the difference as his allowance for depletion. Yet, it is the assignee and the lessor who suffer a diminution in their future income through extraction.

CONCLUSION

The decision of the Board of Tax Appeals should be reversed.

Respectfully submitted,

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.

DECEMBER 1935.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(1) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In the case of leases the deduction shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each. (For percentage depletion in case of oil and gas wells, see section 114 (b) (3).)

* * * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the same as is provided in section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property, except as provided in paragraphs (2) and (3) of this subsection.

(2) *Discovery value in case of mines.*—In the case of mines discovered by the taxpayer after February 28, 1913, the basis for depletion shall be the fair market value of the property at the date of discovery or within thirty days thereafter, if such mines were not acquired as the result of purchase of a proven tract or lease, and if the fair market value of the property is materially disproportionate to the cost. The depletion allowance based on discovery value provided in this paragraph shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property upon which the discovery was made, except that in no case shall the depletion allowance be less than it would be if computed without reference to discovery value. Discoveries shall include minerals in commercial quantities contained within a vein or deposit discovered in an existing mine or mining tract by the taxpayer after February 28, 1913, if the vein or deposit thus discovered was not merely the uninterrupted extension of a continuing commercial vein or deposit already known to exist, and if the discovered minerals are of sufficient value and quantity that they could be separately mined and marketed at a profit.

(3) *Percentage depletion for oil and gas wells.*—In the case of oil and gas wells the allowance for depletion shall be 27½ per

centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 221. *Depletion of mines, oil and gas wells; depreciation of improvements.*

* * * * *

(i) "Depletion allowance based on the income from oil and gas wells": The deduction for depletion based on the income from oil and gas wells shall not exceed 50 per cent of the net income of the taxpayer, computed, without allowance for depletion, from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to the income from the property. The phrase "net income of the taxpayer (computed without allowance for depletion)" means the gross income from the sale of oil and gas less the deductions in respect to the property upon which depletion is claimed, including overhead and operating expenses, development expenses (if the taxpayer has elected to deduct development expenses), depreciation, taxes, losses sustained, etc., but excluding any allowance for depletion. If the oil and gas are not sold on the property but are manufactured or converted into a refined product or are transported from the property prior to sale, then the gross income shall

be assumed to be equivalent to the market or field price of the oil and gas before conversion or transportation. Depreciation, taxes, and such expenses as overhead (which cannot be directly attributed to any particular property) shall be allocated on the basis of the ratio of the number of units produced from the property on which depletion is claimed to the total number of units produced from the operating division in which the property is located. In cases where the taxpayer, in addition to producing oil and gas, engages in additional activities such as operating refineries and transportation lines, depreciation, taxes, and such expenses as overhead which cannot be directly attributed to any specific activity, shall be allocated to the production of oil and gas on the basis of the ratio which the operating expenses and development expenses (if the taxpayer has elected to deduct development expenses) directly attributable to the production of oil and gas bear to the taxpayer's total operating expenses and development expenses.

ART. 235. *Computation of depletion allowance not based on the income from the property in the case of combined holdings of oil and gas wells.*—The recoverable oil belonging to the taxpayer shall be estimated for each property separately. The unit value of the recoverable oil and/or gas for each property is the quotient obtained by dividing the amount returnable through depletion for each property by the estimated number of units of recoverable oil and/or gas on that property. This unit for each separate property multiplied by the number of units of oil and/or gas produced by the taxpayer upon such property and sold

within the year will determine the amount which may be deducted for depletion from the gross income of that year for that property. The total allowance for depletion of all the oil and/or gas properties of the taxpayer will be the sum of the amounts computed for each property separately. However, in the case of gas properties the depletion sustained for each pool may be computed by using the total amount returnable through depletion of all the tracts of gas land owned by the taxpayer in the pool. The total allowance for depletion in the gas properties of the taxpayer will be the sum of the amounts computed for each pool. If, however, the deduction is computed on the basis of the income from the property under section 114 (b) (3), see article 241.

ART. 236. *Depletion—Adjustments of accounts based on bonus or advanced royalty.*— (a) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received.

(b) Where the owner has leased a mineral property for a term of years with a requirement in the lease that the lessee shall extract and pay for, annually, a specified number of tons, or other agreed units of measurement, of such mineral, or shall pay, annually, a

specified sum of money which shall be applied in payment of the purchase price or royalty per unit of such mineral whenever the same shall thereafter be extracted and removed from the leased premises, the value in the ground to the lessor, for purposes of depletion, of the number of units so paid for in advance of extraction will constitute an allowable deduction from the gross income of the year in which sum payment or payments shall be made; but no deduction for depletion by the lessor shall be claimed or allowed in any subsequent year on account of the extraction or removal in such year of any mineral so paid for in advance and for which deduction has once been made.

(c) If for any reason any such mineral lease expires or terminates or is abandoned before the mineral which has been paid for in advance has been extracted and removed, the lessor shall adjust his capital account by restoring thereto the depletion deductions made in prior years on account of royalties on mineral paid for but not removed, and a corresponding amount must be returned as income for the year in which the lease expires, terminates, or is abandoned.

(d) In lieu of the treatment provided for in the above paragraphs the lessor of oil and gas wells may take as a depletion deduction in respect of any bonus, royalties, and other income from the property for the taxable year 27½ percent of the amount thereof, but the deduction shall not exceed 50 percent of the net income (computed without allowance for depletion) from the property.

ART. 241. *Depletion in the case of oil and gas wells.*—Under section 114 (b) (3), in the case of oil and gas wells, a taxpayer may de-

duct for depletion an amount equal to 27½ percent of the gross income from the property during the taxable year, but such deduction shall not exceed 50 percent of the net income of the taxpayer (computed without allowance for depletion) from the property. (See article 221 (i).) In no case shall the deduction computed under this paragraph be less than it would be if computed upon the basis of the cost of the property or its value at the basic date, as the case may be. In general, "the property", as the term is used in section 114 (b) (3) and this article, refers to the separate tracts or leases of the taxpayer.

M. G GOVERNMENT PRINTING OFFICE: 1935

No. 7892

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Commissioner of Internal Revenue,
Petitioner,

vs.

Elliott Petroleum Corporation,
Respondent.

BRIEF FOR THE RESPONDENT.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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BRIEF FOR THE RESPONDENT.

Preliminary Statement.

This appeal involves a deficiency in income tax for the year 1930 in the amount of $1,045.29, and was taken by the Commissioner from a decision in favor of the respondent handed down by the Board of Tax Appeals on January 3, 1935. [R. 52-56-57.]

The Commissioner filed his petition for review on March 19, 1935 [R. 58-63], pursuant to the provisions of *Sections 1001-1003* of the Revenue Act of 1932, as amended by *Section 1001* of the Revenue Act of 1932, *c. 209, 47 Stat. 169,* and by *Section 519* of the Revenue Act of 1934, c. 277, 48 Stat. 680.

Question Involved.

The only question involved is whether or not the respondent is entitled to a depletion deduction of 27½ per cent of the amount of money received by it during the year, under a contract entitling it to receive a certain sum of money to be paid out of one-half of the oil and gas produced from a lease.

Statutes Involved.

Two sections of the Revenue Act of 1928 are involved as follows:

Section 114 (b) (3) which reads:

> "Percentage depletion for oil and gas wells.—In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

Section 23 (1) which reads in part as follows:

> "Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In the case of leases the deduction shall be equitably apportioned between the lessor and lessee."

Statement.

Inasmuch as all the facts were stipulated, it seems sufficient to merely outline the salient facts here.

Respondent, a California corporation, acquired, by assignment, in 1922, an oil lease on oil bearing land in the Santa Fe Springs Oil Field. [R. 10.]

In 1928, when the property was producing oil and gas [R. 48], and when respondent had a considerable investment in the lease [R. 11], it entered into three agreements respecting the lease, with Richfield Oil Company of California. These agreements were called "Assignment of Oil and Gas Lease", "Bill of Sale", and "Collateral Agreement", respectively. [R. 10-11.]

By the agreement marked Exhibit "C", respondent purported to assign the lease to Richfield. [R. 36-38.] By the agreement marked Exhibit "D", respondent purported to sell the equipment on said leased premises to Richfield. [R. 43-46.]

By the agreement marked Exhibit "E", respondent was to receive, as a part of the same transaction out of which the agreements marked Exhibits "C" and "D" arose, $137,500 in cash, and an additional $137,500 to come out of one-half of the net proceeds of all production from the premises covered by the said lease. The Richfield Company agreed to drill another well to a deeper sand, and to comply with all the conditions of the lease (at least until respondent had received the second $137,500). Respondent was to have the right to enter upon the leased prem-

ises, inspect the production records of the Richfield Company, and to have monthly statements of production, as well as monthly payments, until the second $137,500 had been received. Should the Richfield Company abandon the lease or lose it by any default, while it was producing commercially and before respondent had received all of the second $137,500, then the balance of the $137,500 still coming to respondent, should became a personal and direct obligation of Richfield to respondent. [R. 46-51.]

Respondent received the first $137,500 in 1928 and received portions of the second $137,500 as follows:

1928	$19,494.58
1929	$35,797.68
1930	$69,699.81

[R. 11.]

Respondent had no deductions from such amounts, its gross income, in 1930, being the same as its net income from this source. [R. 11.]

ARGUMENT.

Respondent, in Acquiring and Developing an Oil and Gas Lease, Obtained, Through Investment, an Economic Interest in the Oil and Gas in Place and, in Retaining the Right to Share in the Proceeds of Production Therefrom, Retained Such an Interest and Is Entitled to a Depletion Deduction.

It is well established that a lessee of mineral bearing property is entitled to depletion deductions on production therefrom. *Lynch v. Alworth-Stephens Company,* 267 U. S. 364.

It is also settled law that one having a lease and transferring it to another, in considering of a bonus in cash, a further sum of money to be paid out of a portion of the oil produced, plus an overriding royalty of a portion of the oil produced, is entitled to depletion deductions on all of such amounts. *Palmer v. Bender,* 287 U. S. 551.

It has also been held by the Circuit Court of Appeals for the Tenth Circuit, that one who in transferring an oil lease reserves a portion of the oil to be produced until the proceeds of the reserved oil reach a certain sum, is entitled to depletion on the income arising from the production of the reserved oil, as well as on a cash bonus received when the assignment was executed. *Alexander v. Continental Petroleum Company,* 63 Fed. (2d) 927.

After the above decisions had been handed down, the petitioner, through his general counsel, ruled that a lessee assigning a lease for a portion of the net profits derived from the sale of the products of the leased land, was entitled to depletion. *G. C. M. 11,822, C. B. June, 1933, page 229.*

The Board of Tax Appeals has, in deciding several cases, allowed depletion deductions where the facts varied slightly from the facts involved in the preceding cases and ruling. For example, in *William Fleming v. Commissioner,* 31 B. T. A. 623, a lessee assigned a lease and received a sum in cash and was to receive an additional one million dollars out of oil. The contract specified that the Pipe Line Company which purchased the oil was to make the payments which were to come out of the oil. The Board allowed the taxpayer depletion on the payments which were made out of the oil.

In *Thomas A. O'Donnell,* 32 B. T. A. 1277, the taxpayer sold property to a corporation and thereby became entitled to one-third of the net profits derived from the operations of the oil properties. The Board allowed the taxpayer depletion on his portion of the net profits.

Similarly, in *Chester Addison Jones v. Commissioner,* 31 B. T. A. 55, a lessee assigned his lease for cash and a portion of the proceeds of the sale of the oil to be produced from the property. The Board allowed the taxpayer depletion deductions on his share of the proceeds from the sale of the oil. This case was appealed by the Commissioner to the United States Circuit Court of Appeals for the Fifth Circuit on January 3, 1935, but as late as January, 1936, the appeal had not been perfected.

In *W. S. Green v. Commissioner,* 26 B. T. A. 1017, a lessor was entitled to a royalty of 3/32 of the production, and ⅓ of the net profits of the lease. The Board held that he was entitled to depletion deductions on both interests.

The facts in the case at bar compare closely in substance and form, with the facts in the case of *Palmer v.*

Bender, supra, and in the case of *Alexander v. Continental Petroleum Company, supra.* In all three cases, the taxpayers were former lessees and signed papers called "Assignments of Leases". In all three cases, the transferor received a cash sum and was to receive a further sum dependent upon future production. In all three cases, the transferor had an interest in the oil in place, and in its production. All three transferors would have suffered economic losses if the respective oil reserves had been destroyed or the flow had been directed in other channels.

The fact that, in *Palmer v. Bender, supra,* the transferor received an overriding royalty in oil would not seem to be important. The Supreme Court did mention, *page 558,* that the lessees "retained, by their stipulations for royalties, an economic interest in the oil, in place, identical with that of a lessor". The word "royalties" referred to the advanced royalty or bonus, and the amount to be paid out of a portion of oil, as well as the overriding royalty in oil. It should be noted that the Supreme Court allowed depletion on the bonus and the sum paid out of oil.

Royalty is merely rent for the use of the mineral resources of land (*Higgins v. California Petroleum & Asphalt Co.*, 41 Pac. 1087) and its character is the same whether it is paid in kind (*Alexander v. King,* 46 Fed. (2d) 235), so much per year (*40 C. J. 1103*), a portion of the value of the products, a part of the net profits (*Potteric Gas Co. v. Potteric,* 36 Atl. 232), or a portion of the sales price of converted products (*Signal Gasoline Corporation v. Commissioner,* 66 Fed. (2d) 886). See *G. C. M. 3890, C. B. VII-1, page 168,* which states that a royalty is the right to a portion of the production, or the *proceeds* thereof. This court has, in *In re Lathrap,* 61 Fed. (2d) 37, held that persons entitled to percents of

the gross proceeds received from the sale of the oil and gas produced and sold, have *royalty interests* and are participants in the enterprise with the lessee.

It is customary for the lessor to receive his royalty in cash. Advanced royalties or bonuses, received by lessors, are almost universally in cash, but are subject to depletion deductions. *Herring v. Commissioner,* 293 U. S. 322.

Respondent has, therefore, an economic interest in the oil, in place, identical with that of a lessor.

Furthermore, the fact that in *Alexander v. Continental Petroleum Co., supra,* the taxpayer was entitled to a portion of the oil when produced, rather than to the proceeds thereof, does not seem to have been given any importance by the Circuit Court of Appeals for the Tenth Circuit. The court, in comparing the facts of the case before it with the facts in *Palmer v. Bender, supra,* said, page 928:

> "There (in Palmer v. Bender) the depletion was claimed by Palmer, a member of two partnerships, which had sold certain leases. One of the sales was in consideration of a cash bonus and a payment 'out of one-half of the first oil produced and saved,' and the other was of like character. . . ."

If the right to receive oil, rather than the proceeds of oil, as produced, is the test of a depletable right, then the Circuit Court, in the above-named case, would have pointed out that the Continental Petroleum Company was to receive a portion of the *oil,* and that this fact brought the case on all fours with *Palmer v. Bender, supra,* where the taxpayer was to receive a portion of the *oil.*

It is the right to receive royalties of any kind that carries with it the right to depletion. After all, people

engaging in the oil business, whether lessor, lessee, sublessor, or otherwise, eventually reduce their rights in the oil to money. Lessors and assignors of leases usually do not have the facilities to handle the oil received as a royalty in kind. It should not make any difference, in the case at bar, whether respondent was to receive one-half of the oil, until the market price of that one-half, as produced, equalled $137,500, or whether respondent was to receive the proceeds from one-half of the oil produced until its receipts reached $137,500. In either case the Richfield Oil Company would have undoubtedly actually taken the oil and have given respondent the same amount of money.

The petitioner suggests, on page 15 of his brief, that the case is no different than it would be if the entire sum of $275,000 had been paid on the transfer, and cites *Darby-Lynde Co. v. Alexander,* 51 Fed. (2d) 56, certiorari denied, 284 U. S. 666. The respondent points out, however, that in this case the entire sum of $275,000 was not paid on the transfer. The Richfield Oil Company said, in effect, "We will gamble to the extent of $137,500. For any further sum you must show by actual happenings the value of the mineral content. Even then, we will cease payments after one-half of that interest has produced $137,500."

It is clear from the terms of the contract that the respondent had an economic interest in the oil and lease and its interest became depleted by production.

The petitioner cites *Pugh v. Commissioner,* 49 Fed. (2d) 76, certiorari denied, 284 U. S. 642, as being authority for the proposition that one assigning one-half of his royalty interest for a consideration of $250,000, of which $50,000 was payable at once and $200,000 out of future

production of oil, is not entitled to depletion deductions. That case, however, was decided before the Supreme Court rendered its decision in the case of *Palmer v. Bender, supra,* and, of course, is overruled by the latter case.

The petitioner cites the case of *Comar Oil Co. v. Burnet,* 64 Fed. (2d) 965, certiorari denied, 290 U. S. 652, as authority for the proposition that the deferred payment in this case was not a reserved royalty. In that case the taxpayer secured a lease of oil land for a consideration of $50,000 in cash and $100,000 to be paid out of one-eighth of the gross production of oil and gas. The taxpayer claimed the right to deduct the payments, made out of oil under these leases, from gross income on the ground that they were royalties. The court held that the payments were not royalties but were capital expenditures made in connection with the acquisition of capital assets. The *Comar Oil Co.* case, however, did not involve the question of depletion. Furthermore, this court has already held that persons entitled to percentages of the gross proceeds received from the sale of oil and gas produced and sold, have royalty interests. *In re Lathrap,* 61 Fed. (2d) 37.

The fact that respondent may have recovered its investment in the lease prior to the taxable year is of no consequence as the percentage depletion provided for in *Section 114 (b) (3)* of the Revenue Act of 1928, is not dependent on the investment in the oil content or lease.

The petitioner's argument, appearing on page 18 of his brief, that the depletion allowance, under the circumstances of respondent's claim cannot be computed, overlooks the fact that the parties have stipulated the

amount of the depletion deduction in the event the respondent is entitled to a deduction for depletion. [R. 11.] The lessor would deplete his royalties received, and the assignee-lessee would take depletion deductions on the gross income of the property less royalties paid to respondent and the lessor. Thus each party will have a depletion deduction in proportion to the diminution, through production, of his share of the oil in place.

Respondent submits that by retaining the right to share in the proceeds of the oil when produced it has retained an economic interest in the oil in place and is, under the statute and the decisions cited herein, entitled to a depletion deduction.

Respectfully,

MELVIN D. WILSON,
819 Title Insurance Building,
Los Angeles, California.

Counsel for Respondent.

January, 1936.

No. 7900

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

CARSON ESTATE COMPANY,
Respondent.

Transcript of Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Co., 545 Sansome Street, San Francisco 60—8-13-35

No. 7900

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES.

For Petitioner:
HARVEY J. STEVENSON, C.P.A.
JOSEPH D. BRADY, Esq.

For Commissioner:
C. C. HOLMES, Esq.

Docket No. 47444

CARSON ESTATE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

1930

Feb. 10—Petition received and filed. Taxpayer notified. (Fee paid.)

Feb. 11—Copy of petition served on General Counsel.

Apr. 10—Answer filed by General Counsel.

Apr. 14—Copy of answer served on taxpayer, Circuit Calendar.

May 10—Stipulation of facts filed.

1933

July 12—Hearing set in Long Beach, California, beginning September 25, 1933.

Oct. 2—Hearing had before Mr. Van Fossan on merits, submitted, assigned to Mr. Leech,

Division 6, Stipulation of facts filed. Appearances of Joseph D. Brady filed October 3, 1933. Briefs due December 1, 1933.

1933

Oct. 16—Transcript of hearing October 2, 1933, filed.

Nov. 4—Brief filed by taxpayer.

Nov. 28—Motion for extension to December 31, 1933, to file brief, filed by General Counsel. November 29, 1933, Granted to December 15, 1933, both parties.

Dec. 15—Motion to consolidate with docket 53489, filed by General Counsel.

Dec. 15—Brief filed by General Counsel.

Dec. 19—Order consolidating dockets 47444 and 53489 for hearing, entered.

1934

Nov. 15—Opinion rendered, Mr. Leech, Division 6. Decision will be entered under rule 50.

Dec. 14—Notice of settlement filed by General Counsel.

Dec. 18—Hearing set January 9, 1935, on settlement.

Dec. 31—Consent to settlement filed by taxpayer.

1935

Jan. 9—Decision entered, I. Russell Leech, Division 6.

Mar. 25—Petition for review by U. S. Circuit Court of Appeals (9th Circuit) with assignments of error filed by General Counsel.

1935

Apr. 8—Proof of service filed by General Counsel.

Apr. 8—Affidavit of service of petition filed.

May 14—Praecipe filed, proof of service thereon.

May 23—Order enlarging time to June 17, 1935, for transmission and delivery of record entered.

Jun. 13—Order enlarging time to July 15, 1935, for transmission and delivery of record entered. [1]*

Docket No. 53489.

CARSON ESTATE COMPANY, a Corporation,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES.

1931

Mar. 7—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 9—Copy of petition served on General Counsel.

Mar. 27—Answer filed by General Counsel.

April 3—Copy of answer served on taxpayer, Circuit Calendar.

1933

July 12—Hearing set for week of September 25, 1933, Long Beach, California.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1933

Oct. 2—Hearing had before Mr. Van Fossan, Division 9, on the merits, submitted, assigned to Division 6, Mr. Leech. Stipulation of facts filed at hearing. Appearance of Joseph D. Brady filed October 3, 1933. Briefs due December 1, 1933.

Oct. 16—Transcript of hearing October 2, 1933, filed.

Nov. 4—Brief filed by taxpayer.

Nov. 28—Motion for extension to December 31, 1933, to file brief, filed by General Counsel. November 29, 1933, granted to December 15, 1933, both parties.

Dec. 15—Motion to consolidate with docket 47444, filed by General Counsel.

Dec. 15—Brief filed by General Counsel.

Dec. 19—Order to consolidate with docket 47444, entered.

1934

Nov. 15—Opinion rendered, Mr. Leech, Division 6. Decision will be entered under rule 50.

Dec. 14—Notice of settlement, filed by General Counsel.

Dec. 18—Hearing set January 9, 1935, on settlement.

Dec. 31—Consent to settlement, filed by taxpayer.

1935

Jan. 9—Decision entered, Mr. Leech, Division 6.

1935

Mar. 25—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

Apr. 8—Proof of service filed by G. C. (2).

Apr. 8—Affidavit of service filed.

May 14—Praecipe with proof of service thereon filed.

May 23—Order enlarging time to June 17, 1935, for transmission and delivery of record entered.

Jun. 13—Order enlarging time to July 15, 1935, for transmission and delivery of record entered. [2]

United States Board of Tax Appeals

Docket Number 47444

CARSON ESTATE COMPANY, a corporation,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated January 9, 1930 (Bureau Symbols IT:AR:C-4 CLG-6OD) and as a basis of its proceedings alleges as follows, to-wit:

1. The petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, and is transacting business therein, with its principal place of business in the City of Los Angeles, in said State of California, its mailing address being 1119 Bank of America Building, Los Angeles, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A"), was mailed to the petitioner January 9, 1930.

3. The taxes in question are income taxes for the calendar years 1926 and 1927, those for the calendar year 1926 being $2,086.02, and those for the calendar year 1927 being $1,780.08, a grand total of $3,866.10.

4. The determination of tax set forth in the said notice of deficiency for the said calendar years 1926 and 1927 is based on the following errors:

(a) Petitioner has been erroneously taxed for the calendar year 1926 on interest received in the sum of $9,624.01 on certificate of ownership in municipal bonds issued by the Municipal Bond Company.

(b) Petitioner has been erroneously taxed for the calendar year 1927 on interest received in the sum of $10,327.50 on certificates of ownership in municipal bonds issued by the Municipal Bond Company. [3]

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner alleges that by virtue of its ownership of Certificates of Ownership in Municipal Bonds, issued by the Municipal Bond Company, it was the owner of a beneficial interest of municipal bonds in trust for the benefit of petitioner and therefore the interest in question was interest received from municipal bonds and accordingly tax exempt.

(b) The petitioner alleges that by virtue of its ownership of Certificates of Ownership in Municipal Bonds issued by the Municipal Bond Company, it was the owner of a beneficial interest of municipal bonds in trust for the benefit of petitioner and therefore the interest in question was interest received from municipal bonds and accordingly tax exempt.

6. Your petitioner prays for relief from the deficiencies asserted by the respondent for the calendar years 1926 and 1927 as alleged herein with respect to the addition of $9,624.01 and $10,327.50 to taxable income of petitioner for the respective years.

WHEREFORE, the petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

HARVEY STEVENSON,
Counsel for Petitioner, 821 Security Bldg., Los Angeles, California.

State of California,
County of Los Angeles.—ss.

H. H. COTTON hereby duly sworn says: that he is the Secretary of Carson Estate Company, the

petitioner herein, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

H. H. COTTON

Subscribed and sworn to before me this 30th day of January, 1930.

[Seal] MARGUERITE McDONALD

Notary Public in and for the County of Los Angeles, State of California. [4]

EXHIBIT A.

Treasury Department
Washington, Jan. 9, 1930.

IT:AR:G-4
CLG-6OD

Carson Estate Company, Incorporated,
c/o Harvey J. Stevenson,
Security Building,
Los Angeles, California

Sirs:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1926 and 1927 discloses a deficiency of $3,866.10, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully

ROBT. H. LUCAS
Commissioner

By DAVID BURNET
Deputy Commissioner

EED-1
Inclosures L
Statement
Form 866
Form 882 [5]

STATEMENT.

IT:AR:C-4
CLG-6OD

In re: Carson Estate Company, Incorporated

c/o Harvey J. Stevenson,
Security Building,
Los Angeles, California.

Tax Liability.

Years	Corrected Tax Liability	Tax Previously Assessed	Deficiency
1926	$ 2,459.62	$ 373.60	$2,068.02
1927	12,422.85	10,642.87	1,780.08
Totals	$14,882.57	$11,016.47	$3,866.10

Reference is made to the report of the Internal Revenue Agent in Charge, San Francisco, California, and to your protests submitted under dates of March 4, April 15 and October 29, 1929.

Careful consideration has been accorded your protests in connection with the agent's findings and the report on the conference held with your representatives on April 26, 1929, in the office of the Agent in Charge.

With respect to land valuation of acreage, acquired in 1914 and sold during 1926 and 1927, the following values are considered reasonable:

Acreage	Value per Acre
16.913 acres (Alexander Allotment)	$800.00
34.71 acres (Rancho-San-Pedro)	$700.00
11.8 acres (Rancho-San Pedro)	$700.00
8.37 acres (Dominguez Colony Tract, Parcels 3, 4 and 5	$500.00

Your contention regarding exclusion from gross income of interest received on certificates of ownership in municipal bonds of the Municipal Band Company has been given further consideration and cannot be conceded for the reason that the certificates issued are obligations of the Municipal Bond Company and any interest received by a holder of such certificate is subject to Federal income tax. Reference, General Counsel Memorandum 1451, Cumulative Bulletin VI-1, Page 29. [6]

1926

Net Income reported		$ 2,557.21
Add:		
1. Interest	$9,624.01	
2. Excessive depletion	958.68	
3. Understatement of profit on sale of Lot 43	137.50	
4. Loss on sale of acreage	6,942.00	17,662.19
Net income as adjusted		$20,219.40

Explanation of Changes.

1. Interest received by the corporation on certificates of ownership in municipal bonds of the Municipal Bond Company is taxable income. Reference, General Counsel, Memorandum 1451 Cumulative Bulletin VI-1, page 29.

2. The allowance for depletion has been computed under Section 204 (c) (2) of the Revenue Act of 1926 as follows:

Gross income from oil wells	$3,840.05
Allowable depletion:	
27½% of gross income	$1,056.01
Depletion deducted on return	2,014.69
Excessive depletion	$ 958.68

3. Profit on sale of Lot 43 of Tract 4054 has been computed as follows. Reference, Article 1561, Regulations 69.

Sale Price	$7,500.00
Cost of Lot	3,781.00
Profit on sale	$3,719.00
Profit reported on return	3,581.50
Difference	$ 137.50

4. Loss on the sale of 34.71 acres Rancho-San Pedro has been computed in accordance with Article 1561, Regulations 69. A value of $700.00 an acre as of 1914 has been placed on this land. [7]

Selling price, 34.71 acres	$13,884.00
Cost (34.71 @ $700.00 an acre)	24,297.00
Loss on sale	$10,413.00
Loss reported on return	17,355.00
Overstatement	$ 6,942.00

Computation of Tax

Net income as adjusted		$20,219.40
Less:		
Credit		2,000.00
Balance subject to tax		$18,219.40
Income tax at 13½%		$ 2,459.62
Tax previously assessed		373.60
Deficiency in tax		$ 2,086.02

1927

Net income reported		$78,836.04
Add:		
1. Interest	$10,327.50	
2. Excessive depletion	490.29	
3. Profit on sale of land	2,360.00	
4. Sale of lots 44 and 45	8.02	13,185.81
Net income adjusted		$92,021.85

Explanation of Changes

1. See explanation #1 adjustment to income 1926.
2. See explanation #2 adjustment to income for 1926.

Gross income from oil wells	$ 2,244.60
27½% of gross income	617.27
Depletion claimed on return	1,107.56
Excessive depletion	$ 490.29

3. See explanation #4 adjustment to income for 1926. [8]

Selling price 11.8 acres Rancho San Pedro	$47,200.00
Cost of 11.8 acres @ $700.00 per acre	8,260.00
Profit on sale	$38,940.00
Profit reported on return	36,580.00
Difference	$ 2,360.00

4. Profits on sale of Lots 44 and 45 Tract 4054 is computed as follows: Articles 1561, Regulations 69. A value of $600.00 an acre is allowed on this property which was acquired by the corporation in 1914.

Selling price	$ 1,749.09
Cost of property	218.97
Profit on sale	$ 1,530.12
Profit reported	1,522.10
Difference	$ 8.02

Computation of Tax

Net income as adjusted	$92,021.85
Income tax at 13½%	$12,422.95
Tax previously assessed	10,642.87
Deficiency in tax	$ 1,780.08

Your claim for refund of $298.38 for 1926 will be rejected as the tax liability for 1926 is in excess of the amount previously assessed. The rejection will appear on a schedule to be approved by the Commissioner.

A copy of this communication has been furnished your representative, Mr. Harvey J. Stevenson, 401 Security Building, Los Angeles, California.

[Endorsed]: Filed Feb. 10, 1930. [9]

[Title of Court and Cause—Docket No. 47444.]

ANSWER.

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition herein.

2. Admits the allegations contained in paragraph 2 of the petition herein.

3. Admits that the taxes in controversy are income taxes for the calendar years 1926 and 1927, but denies that the amounts in controversy are the amounts stated in paragraph 3 of the petition herein.

4. Denies that the respondent erred in the manner alleged in paragraph 4 of the petition herein.

5. Denies the allegations contained in paragraph 5 of the petition herein. [10]

Denies generally and specifically each and every allegation contained in the petition herein not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

OF COUNSEL:
BROOKS FULLERTON,
Special Attorney
Bureau of Internal Revenue.

FJK/amm

[Endorsed]: Filed Apr. 10, 1930. [11]

[Title of Court and Cause—Docket No. 53489.]

PETITION.

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated January 28, 1931 (Bureau Symbols IT:AR:E-3 JAH-60D) and as a basis of its proceeding alleges as follows, to-wit:

1. The petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, and is transacting business therein, with its principal place of business in the City of Los Angeles, in said State of California, its mailing address being 1119 Bank of America Building, Los Angeles, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on January 28, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928 in the sum of $1,815.31.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) Petitioner has been erroneously taxed for the calendar year 1928 on interest received in the sum of $12,127.51 on certificates of ownership in municipal bonds issued by the Municipal Bond Company. [12]

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner alleges that by virtue of its ownership of Certificates of Ownership in Municipal Bonds, issued by the Municipal Bond Company, it was the owner of a beneficial interest of municipal bonds in trust for the benefit of petitioner and therefore the interest in question was interest received from municipal bonds and therefore tax exempt.

6. Your petitioner prays for entire relief from the deficiency asserted by the respondent for the calendar year 1928 as alleged herein.

WHEREFORE the petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

HARVEY STEVENSON
Counsel for Petitioner, 820 Security Building,
Los Angeles, California.

State of California,
County of Los Angeles.—ss.

H. H. COTTON hereby duly sworn says: that he is the Secretary of Carson Estate Company, the petitioner herein, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true except to the facts stated upon information and belief, and those facts he believes to be true.

[Seal] H. H. COTTON

Subscribed and sworn to before me this 28th day of February, 1931.

[Seal] MARGUERITE McDONALD
Notary Public in and for the County of Los Angeles, State of California. [13]

EXHIBIT "A".

NP-2-28

Treasury Department
Washington

Jan 28, 1931

Office of
Commissioner of Internal Revenue
Carson Estate Company,
c/o Harvey J. Stevenson,
Security Building,
Los Angeles, California

Sirs:

You are advised that the determination of your

tax liability for the year 1928 discloses a deficiency of $1,815.31 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of the deficiency.

Respectfully

DAVID BURNET,
Commissioner
By W. T. SHERWOOD
Acting Deputy Commissioner

Enclosures:
Statement
Form 882
Form 870 [14]

STATEMENT.

IT:AR:E-3
HAJ-60D

In re: Carson Estate Company,
c/o Harvey J. Stevenson,
Security Building,
Los Angeles, California.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1928	$3,563.02	$1,747.71	$1,815.31

The report submitted by the internal revenue agent in charge, Los Angeles, California, covering an examination of your books of account and records for the year 1928, has been reviewed and the findings set forth therein approved.

Your contention relative to nontaxability of interest received on "Convertible Certificates of Ownership" issued by the Municipal Bond Company of Los Angeles, California, cannot be conceded.

Under the provisions of General Counsel's Memorandum number 1451, published in Cumulative Bulletin VI-I, page 29, it is held that the certificates involved represent obligations of the Municipal Bond Company and any interest received by a holder of such certificates is subject to Federal income tax.

Net Income

Net income reported on return	$17,564.29
Add:	
1. Interest from Municipal Bond Company	12,127.51
Net income as adjusted	$29,691.80

Explanation of Adjustment

1. See statement above [15]

Computation of Tax

Net income	$29,691.80
Less:	
Exemption	None
Amount taxable at 12%	$29,691.80
Tax at 12%	$ 3,563.02
Tax previously assessed	1,747.71
Deficiency	$ 1,815.31

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1928 the Bureau will be unable to afford you an opportunity under the provisions of article 1211 of Regulations 69 and/or article 451 of Regulations 75 to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of

1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

[Endorsed]: Filed March 7, 1931. [16]

[Title of Court and Cause.]

[Title of Court and Cause—Docket No. 53489.]

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies that the Commissioner committed the errors alleged in paragraph 4.

5. Denies the allegations contained in paragraph 5.

Denies, generally and specifically, each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

SBA/mhk 3/25/31.

(Signed) C. M. CHAREST
General Counsel, Bureau of Internal Revenue.

Of Counsel:
ARTHUR CARNDUFF,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Mar. 27, 1931. [17]

United States Board of Tax Appeals.

Docket Nos. 47444, 53489.

CARSON ESTATE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated November 15, 1934.

Where a corporation issued to petitioner certificates of ownership purporting to evidence a sale of the corporation's title and interest, to a specified extent, in municipal bonds, the interest on which was exempt from income tax, deposited with a trustee under a trust agreement, which instruments, construed as a whole, indicated a transfer of beneficial ownership in the bonds was intended and effected, and not a loan, held, that

petitioner became the beneficial owner of such bonds, and the interest it received, through the trustee, was in payment of interest on those bonds and therefore exempt from Federal income tax.

Harvey J. Stevenson, C.P.A. and Joseph D. Brady, Esq., for the petitioner.

Clay C. Holmes, Esq., for the respondent.

OPINION.

LEECH: These consolidated proceedings seek redetermination of income tax deficiencies in the amounts of $2,086.02 for the year 1926, $1,780.08 for the year 1927, and $1,815.31 for the year 1928. The total deficiencies for 1926 and 1927 are not in controversy.

The facts are stipulated. A rather full resume of them follows:

Petitioner is a California corporation. It acquired certain certificates of ownership from Municipal Bond Co., hereinafter referred to as the corporation.

The form of ownership certificate issued by the corporation provides that the corporation "does hereby sell and transfer to the purchaser of this certificate all of its rights, title and interest in Municipal Improvement Bonds issued under the special assessment laws of the State of California", of a specified unpaid face value; that the corporation certifies that such bonds and other like bonds are deposited with a named trustee to hold the same under

a trust agreement made a part of the certificate as though incorporated therein; that the bearer or registered holder of the certificate "is entitled [18] to participate in the proceeds and avails of such bonds, so deposited, to the extent of the principal sum of ..... Dollars, payable from such proceeds and avails on the ..... day of ..... 19...., with interest on said sum from the date hereof at the rate of ..... Per Cent (....%) per annum, payable semi-annually on the first days of ..... and ..... in each year upon surrender of the coupons hereto attached, as they severally mature"; that the owner of the certificate "is entitled at any time upon demand and surrender of this certificate, together with its unmatured coupons, to said trustee, to receive bonds of unpaid face value equal to the principal sum herein mentioned, the accrued interest to be adjusted as of date of delivery on both this certificate and the bonds so delivered"; that the certificate owner "releases and waives" all interest or other sums collected by the trustee upon such bonds, in excess of the principal sum and interest at the rate specified in the certificate. The corporation has deposited with the trustee, unpaid face value bonds equal to 110 percent of the principal sum stated in the certificate, "for the purpose of better securing the distribution of the proceeds and avails of such bonds"; that the corporation covenants "that the principal and interest to become due upon said bonds, when and as the same matures, will be paid, such covenant to continue as long as such bonds remain on deposit with said

Trustee." The form of the coupon attached to the certificate provides that the certificate owner "IS ENTITLED to RECEIVE ..... Dollars from the avails of Bonds on deposit with said Bank in Trust No. ...., according to the terms of such Trust, and the Undersigned (the corporation) covenants that the avails from such Bonds will be paid." The form of the trustee's certificate provides that "The undersigned hereby certifies that the within certificate and coupons attached, is one of the certificates executed by Municipal Bond Company under an Agreement of Trust with this Corporation, dated ....." and further, that there has been deposited with it, bonds of the designated character and of the unpaid face value of 110 percent of the principal sum stated in the certificate.

The trust agreement sets out that the corporation desires to sell municipal improvement bonds which it owns or may acquire; that such bonds vary in amounts and dates of maturity; that the corporation, instead of selling specified bonds, desires to sell to the purchaser an interest in such bonds in even sums such as $100 or multiples thereof, and reinvesting for such purchaser the principal of such bonds as they mature to the end that the purchaser shall have his money invested in such bonds for a definite period such as five or ten years; that to accomplish such purpose, the corporation desires to deposit such bonds with the trustee "for the use and benefit [19] of such person as may purchase an interest therein"; that the corporation desires to issue

the above-mentioned certificates of ownership to such purchasers; and, further, that "in consideration of the premises, the said Trustee hereby agrees to accept from said Corporation, such bonds and to hold the same for the benefit of the holders of such certificates, in trust upon the terms and conditions and for the purposes herein set forth." The terms and conditions of the trust, the duties and obligations of the trustee and the corporation, and also the rights of the parties, including the purchaser, are set forth in great detail. Article II provides for the deposit of bonds with the trustee and section 3 thereof provides, "said Corporation shall transfer, assign and set over to said Trustee the absolute title to said bonds, to hold in accordance with the provisions of this Trust Agreement, and shall execute any and all transfers, assignments or other instruments necessary to pass the title in said bonds to said Trustee." Article III provides that the corporation may withdraw any of the bonds upon delivery to the trustee of an equal amount of unpaid face value of bonds of the same character, provided the aggregate interest on the substituted bonds shall equal or exceed the interest specified in the certificates. Article IV provides that the trustee shall collect or cause to be collected, interest on the bonds for the benefit of the trust; that the corporation agrees to purchase for cash at face value any interest coupons due and uncollected; that the trustee shall sell to the corporation all installment coupons of principal falling due and maturing serial bonds, for which the corpora-

tions agrees to deliver to the trustee other bonds of the same character of an unpaid face value equal to the coupons and maturing bonds, such other bonds to be held for the benefit of the certificate holders; and that the purpose and intent is that trustee shall collect the interest accruing on all bonds for the benefit of the trust and as the bonds mature the principal to be immediately reinvested in like bonds for the benefit of the trust. Article V provides that out of moneys received from the collection or sale of interest coupons on the municipal bonds, the trustee shall pay to the certificate owners the interest specified therein and, after deducting the trustee's charges, pay the excess to the corporation as income on the excess 10 percent of bonds deposited and as compensation to the corporation for selling ownership certificates and collecting interest and principal for the trustee. The corporation is entitled to any bonus or penalty received by the trustee upon payment of any bond. Articles VI and VII provide for the payment of the principal sum stated in the ownership certificate, prior to maturity upon demand, by delivery to certificate holder of specific bonds, selected by the trustee, or at maturity by cash or unpaid bonds at [20] the election of the certificate owner. The corporation agrees to repurchase bonds, at their unpaid face value, and equal to the face value of maturing certificates, at the maturity of the latter, with the proceeds of which sales to the corporation, the maturing certificates are to be paid. Article VIII, section 1, provides, "It is the intention

of the parties hereto that the delivery to the purchaser thereof of a certified certificate, vests in the holder of such certificate the ownership of an amount in unpaid face value bonds, equal to the par value of the certificate, subject to the implied agreement on the part of the purchaser of such certificate by the acceptance thereof, to allow the said bonds to remain in the hands of the Trustee for collection under the terms and conditions of this Trust, and also subject to the release and waiver by the holder thereof of all interest, bonuses, penalties or other sums collected by the Trustee upon the bonds so deposited with the Trustee, in excess of the principal sum mentioned in such certificate and the interest on such principal sum at the rate specified in said certificate." Article IX provides that the certificates of ownership may be transferred, and also provides for the registration of such certificates. Article X provides that the corporation in joining in the execution of the trust agreement, warrants that the bonds deposited with the trustee are legal, valid and subsisting obligations, and that the installments of principal and interest specified in each bond will be paid as and when the same mature. Article XI sets forth the responsibility of the trustee under the terms of the trust, and Article XII fixes the amount of the trustee's fees.

The petitioner received "interest income" pursuant to and in accordance with the terms and provisions of the above mentioned ownership certificates at the rate of 6 percent per annum, payable semiannually as follows:

Calendar year 1926	$9,624.01
Calendar year 1927	10,327.50
Calendar year 1928	12,127.51

During the taxable years here in controversy none of the "interest income" here involved flowed to petitioner by reason of any of the warranties or covenants of Municipal Bond Co. or from bonds bearing an interest rate of less than 7 percent.

All of the bonds which were deposited in the trust provided for in the above trust agreement were municipal improvement bonds, issued under special assessment laws of the State of California. The interest on these bonds was not subject to Federal income tax.

In its returns filed for the calendar years 1926, 1927, and 1928, petitioner treated the above amounts as interest received from municipal bonds and reported it as tax exempt. [21]

Respondent restored the amounts in controversy to taxable income on the ground that such amounts constituted interest on obligations of the Municipal Bond Co. and not interest on tax exempt securities.

Thus, the only issue is whether the petitioner's acquisition of the certificates of ownership constituted a sale to it by the corporation of the beneficial ownership in municipal bonds, the interest on which is admittedly exempt from income tax, or was a loan by petitioner to the corporation, and the "interest income" thus received by petitioner as interest on the obligation of the corporation, and subject to that tax. This question is answered by the intention of

the parties to the transaction evidenced by the "certificates of ownership" and the "trust agreement" made part thereof, construed as a whole (Heryford v. Davis, 102 U. S. 225), together with the actual treatment of the transaction by the parties thereto. First National Bank in Wichita v. Commissioner, 57 Fed. (2d) 7, affirming 19 B. T. A. 744; certiorari denied, 287 U. S. 636; Bank of California, National Association, 30 B. T. A. 556. Since it is stipulated that the disputed "interest income" was received in accordance with the terms of the certificates of ownership, which incorporated the "trust agreement" therein, we are concerned here only with the proper construction of those instruments. Cf. Frank Turner, 28 B. T. A. 91.

Undoubtedly the "certificate of ownership" on its face purports to "sell and transfer to the purchaser of this certificate all of its rights, title and interest in the Municipal Improvement Bonds", deposited with the trustee under the "trust agreement" made a part thereof. That agreement contains all the essentials of a valid irrevocable declaration of trust. In unmistakable terms, it states that "It is the intention of the parties hereto that the delivery to the purchaser thereof of a certified certificate, vests in the holder of such certificate ownership of an amount in unpaid face value bonds equal to the par value of the certificate", subject to the conditions of the agreement.

Respondent argues that the qualifications attached to this purported transfer of beneficial ownership, in

the express and implied conditions of these instruments, are inconsistent with the transfer of any interest in the municipal bonds by the corporation to petitioner, and characterize the transaction as a loan from petitioner to the corporation, secured by a lien on escrowed guaranteed municipal bonds.

The absence of control by petitioner over the deposited bonds was a natural and not peculiar incident of a valid trust. Nor was the conditional right of the corporation to substitute bonds with the trustee inconsistent with such a trust. Campbell v. Campbell, 207 Ky. 17; 268 S. W. 588; Leland v. Collver, 34 Mich. 318; S. A. Lynch, [22] 23 B. T. A. 435. The spread between the interest rate on the deposited bonds and that of the certificates of ownership, while of some possible significance, is certainly not controlling (cf. First National Bank in Wichita v. Commissioner, supra, and Bank of California, National Association, supra), particularly since the certificate rated was not the legal loan rate. Sec. 1, Act No. 3757 of the State of California, approved Nov. 5, 1918.

The corporation's repurchase agreement did not invalidate the trust by making incomplete the otherwise completed transfer, nor did it divest the ownership then conveyed. Lyons v. Snider, 136 Minn. 252; 161 N. W. 532; Paulson v. Weeks, 80 Or. 468; 157 Pac. 590. Although the fact that the repurchase price was par value, which was the basis upon which petitioner purchased, has been considered as some, though not compelling, indication of a loan (cf. First National Bank in Wichita v. Commissioner,

supra, and Bank of California, National Association, supra), it has been held to evidence the transfer of an entire interest and thus imply sale. Chase & Baker Co. v. National Trust & Credit Co. (Dist. Ct., N. Dist. Ill.), 215 Fed. 633.

The warranty of the deposited bonds and the interest payable thereon, with the auxiliary 10 per cent excess deposit of bonds, is at least equally consistent with an intended separate contract from that of sale or transfer in trust, as it is with a loan secured by guaranteed collateral. Chase & Baker Co. v. National Trust & Credit Co., supra.

The corporation's right to any premiums or penalties on the deposited bonds, said to be evidential of its failure to transfer beneficial ownership therein, loses its value in the presence of petitioner's right upon its demand to specific bonds, and thus to secure such profit. This right of petitioner, while possible of construction as an option if the transaction under consideration were a loan, is just as consistent with a condition terminating the trust as to petitioner if the transaction was a sale of a beneficial interest. Cary v. Slead, 220 Ill. 508; 77 N. E. 234; Tuck v. Knapp, 85 N. Y. S. 1001; 42 Misc. Rep. 140; In re Ames, 22 R. I. 54; 46 Atl. 47. Nor is that consistency lost by the mandatory selection by the trustee of bonds to satisfy such demand as the class for which the selection is to be made, is certain. In re Dewey's Estate, 45 Utah 98; 143 Pac. 124.

A beneficial interest in the deposited bonds in the corporation, to the extent of the excess deposited,

the premiums and penalties to be received on the bonds and the difference in interest received on the bonds and that paid on the certificates, and the remaining beneficial ownership in the deposited bonds in petitioner, is likewise consistent with a valid trust. Certainly the creator of a trust may also be a [23] beneficiary thereof, either alone or jointly. Reginald Brooks, 31 B. T. A. 70; Iola Wise Stetson, 26 B. T. A. 390; 27 B. T. A. 173.

The argument that if a valid trust was created it was "in the avails of the bonds" and not the bonds themselves, is of little, if any weight, generally, in itself, and fails here particularly because upon termination of the trust as to petitioner it had the right to demand specific bonds. This right at maturity, as well as its alternative, the right to the "avails of the bonds" at the full par value of the certificate of ownership, contradicts the deposit of bonds as a mere escrow transfer to secure a primary obligation of the corporation. Cf. Frank Turner, supra; Frank P. Welch, 12 B. T. A. 800.

In short, the "certificate of ownership" and "trust agreement" disclose nothing inconsistent with the stated intention of creating an irrevocable trust in municipal bonds and selling the beneficial ownership thereof. Neither document contains any primary obligation of the corporation to petitioner, certificate holder. The only obligation of the corporation was its secondary liability on its covenant of warranty, from which none of the questioned amounts flowed. The necessary complement of re-

spondent's present position would permit the pending disputed exemption to the corporation—certainly a difficult result to sustain.

Then again, and of emphatic if not compelling persuasion here, we have the uncontradicted background and purpose of the transaction.

This record contains no history or suggestion branding the corporation as at any time a borrower and petitioner as a lender. It indicates only that they were seller and purchaser. Cf. First National Bank in Wichita v. Commissioner, supra; Bank of California, National Association, supra; Frank Turner, supra.

The business of the corporation was the sale of these municipal bonds of odd face value and maturities. The present uncontradicted purpose of increasing the marketability of such bonds by eliminating these unfavorable features and the means chosen to effect it, are both credible and legal. Cf. Reginald Brooks, supra.

We conclude that the corporation created a valid irrevocable trust in municipal bonds, the interest on which, admittedly exempt from income tax, constituted its only income; that petitioner was a beneficial owner of those bonds and received the controverted "interest income" as such, thereon, free from income tax. Cf. Norfolk National Bank of Commerce & Trusts v. Commissioner, 56 Fed. (2d) 48; reversing 26 B. T. A. 1111.

Reviewed by the Board.

Decision will be entered under Rule 50.

[Seal] [24]

United States Board of Tax Appeals.
Washington.

Docket Nos. 47444, 53489.

CARSON ESTATE COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the Opinion of the Board promulgated November 15, 1934, the respondent herein having filed on December 14, 1934, notices of settlement and proposed recomputations and the petitioner on December 31, 1934, having acquiesced in the recomputations as made by the respondent, now therefore, it is

ORDERED AND DECIDED that there are deficiencies in income taxes for the year 1926 in the amount of $786.78; for the year 1927 in the amount of $385.87; and there is no deficiency for the year 1928.

Enter: Jan. 9, 1935.

[Seal] (Signed) J. RUSSELL LEECH,

Member. [25]

[Title of Court and Cause—Docket No. 47444.]

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto:

That the name of the petitioner corporation is the Carson Estate Company, that petitioner filed its income tax returns, bearing the corporate seal for the calendar year 1926, on March 15, 1927 (and the amended return for that year on March 28, 1928) and for the calendar year 1927 on March 15, 1928.

That a deficiency notice (bearing symbols IT:AR:C-4-CLG-60D) in respect of said years was mailed January 9, 1930, addressed to Carson Estate Company, Incorporated, c/o Harvey J. Stevenson, Securities Building, Los Angeles, California.

That the petition on appeal from the determination in such deficiency notice, is the name of Carson Estate Company, a Corporation.

That the petitioner is a corporation, created in 1914, and no reorganization or other change in the corporate entity has occurred since incorporation.

That the deficiency notice was received by petitioner and that Carson Estate Company, a corporation, as shown by the tax returns and the petition in this appeal, is the same corporate and taxable entity as Carson Estate Company, Incorporated, shown by the said deficiency notice, and that said [26] deficiency notice was received by said corporate entity and that the appeal of Carson Estate

Company, a corporation, is from the determination of tax liability set out in said deficiency notice.

(Sgd) HARVEY J. STEVENSON,
Counsel for Petitioner.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

[Endorsed]: Filed May 10, 1930. [27]

[Title of Court and Cause.]

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the above parties through their respective attorneys of record that the following facts are true and that the case shall stand submitted on these agreed facts without other testimony by either party:

1. Petitioner is a California corporation organized January, 1914, under the laws of the State of California, and for the years in controversy duly filed its income tax returns with the Collector of Internal Revenue for the Sixth District, Los Angeles, California.

2. The petitioner received interest income pursuant to and in accordance with the terms and provisions of certain Ownership Certificates issued by Municipal Bond Company during the periods and in the amounts as shown below, said interest being

at the rate of six per cent. per annum, payable semi-annually:

Calendar year	1926	$ 9,624.01
" "	1927	10,327.50
" "	1928	12,127.51

3. That Exhibit "A" hereto annexed is a true and correct copy of the form of Ownership Certificate above referred to and of the form of Trust Agreement referred to in said Certificate.

4. That during the taxable years here in controversy none of the interest income here involved flowed to petitioner by reason of any of the warranties or covenants of Municipal Bond Company or from bonds bearing an interest rate of less than seven per cent.

5. That all of the bonds which were deposited in the trust pro- [28] vided for in said Trust Agreement were municipal improvement bonds, issued under special assessment laws of the State of California; and it is conceded by respondent that the interest on said bonds was not subject to the federal income tax.

6. In its returns filed for the calendar years 1926, 1927 and 1928, petitioner treated the above amounts as interest received from municipal bonds and reported it as tax exempt.

7. Respondent restored the amounts in controversy to taxable income on the ground that such amounts constituted interest on obligations of the

Municipal Bond Company and not interest on tax exempt securities.

October 2nd, 1933.

(Sgd) HARVEY J. STEVENSON,
Counsel for Petitioner.

(Sgd) E. BARRETT PRETTYMAN,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent. [29]

EXHIBIT A.

Trust Agreement.

THIS AGREEMENT, made and entered into this ..... day of ....., 19..... between ....., first party, ..., and ..... second party, hereinafter referred to as the "Trustee,"

Witnesseth:

WHEREAS, said Corporation is desirous of selling Municipal Improvement Bonds, issued under special assessment laws of the State of California, (hereinafter referred to as "Bonds"), which it now owns or which it may hereafter acquire; and

WHEREAS, said bonds are in varying amounts and are rarely in denominations of an even sum, such as $100, $500, or $1000, and some of such bonds have different maturities, or mature serially, and some of their terms provide for the payment of one-tenth of the original principal thereof on the second day of January in each year, all of which bonds

provide for the payment of interest on the unpaid principal, payable semi-annually on the second days of January and July in each year; and

WHEREAS, said Corporation, instead of selling to a purchaser certain specific bonds, is desirous of selling to such purchaser, an interest in such bonds, in even sums, such as $100, $500, or $1000, and reinvesting for such purchaser the principal of such bonds, or annual installments thereof, as and when the same matures and is paid, in other like bonds, to the end that the said purchaser shall have his money invested in such bonds for a definite period of time, such as five years or ten years; and

WHEREAS, in order to accomplish said purpose and to assure to such purchaser the continuous investment for a definite period of the amount invested by him in the purchase of such bonds, the said Corporation is desirous of depositing such bonds now owned by it or which it may hereafter acquire, in trust with the said second party, as Trustee, for the use and benefit of such persons as may purchase an interest therein; and

WHEREAS, the Corporation desires to issue to such purchasers a Certificate of such Corporation, to be known as "MUNICIPAL BOND COMPANY CONVERTIBLE CERTIFICATE OF OWNERSHIP IN MUNICIPAL BONDS" (hereinafter designated "certificate") certifying that the bearer or registered owner thereof is entitled, during the term of such certificate, to interest as stated therein

and as evidenced by coupons thereto attached, and is entitled, upon maturity and surrender of such certificate, to the proceeds and avails of such bonds to the extent of the principal sum mentioned in such certificate, or in lieu thereof to receive, upon such maturity, bonds of unpaid face value equal to such principal sum, and also certifying that such bearer or registered owner is entitled prior to maturity, upon demand and the surrender of such certificate, together with its unmatured coupons, to receive bonds of unpaid face value equal to the principal sum mentioned in such certificate; [30]

NOW, THEREFORE, in consideration of the premises, the said Trustee hereby agrees to accept from said Corporation, such bonds and to hold the same for the benefit of the holders of such certificates, in trust upon the terms and conditions and for the purposes herein set forth, to-wit:

Article I.

ISSUANCE AND CERTIFICATION OF CERTIFICATES:

Section 1. The certificates issued by said Corporation shall be known as "MUNICIPAL BOND COMPANY CONVERTIBLE CERTIFICATES OF OWNERSHIP IN MUNICIPAL BONDS," a specimen form of which is hereunto attached, made a part hereof and marked "Exhibit A".

Section 2. Said certificates shall be signed by the President or Vice-President of the Corporation

and the Secretary of the Corporation and the coupons thereto attached shall be signed by the Secretary of the Corporation, by a facsimile signature stamped, printed, lithographed or engraved upon said coupons.

Section 3. The par value of the certificates to be issued under "Series....." shall amount to..... Subsequent series may be in such amount as said Corporation may determine, but the total par value of such certificates outstanding at one time, covered by this Trust Agreement, shall not exceed the sum of .....

Section 4. The Trustee shall only be called upon to certify such certificates, as and when there shall have been deposited by said Corporation with said Trustee, subject to this Trust, bonds of the character hereinafter specified, equal in unpaid face value to ONE HUNDRED AND TEN PER CENT (110%) of the par value of the said certificates so certified.

Section 5. Said certificates, issued by said Corporation, may bear any date subsequent hereto and may be issued in Series payable at any given time and drawing interest at any rate per cent, provided, however, that no certificate shall be issued with a past due interest coupon attached thereto, which has not been cancelled, or with coupons attached thereto, calling for the payment of interest beyond the date of maturity of said certificate.

Article II.

DEPOSIT OF BONDS WITH TRUSTEE:

Section 1. The bonds to be deposited by the Corporation with said Trustee, under the provisions of this Trust Agreement, shall be Municipal Improvement Bonds, issued under special assessment laws of the State of California. Wherever the word "bond" or "bonds" is used in this agreement, such word shall indicate and refer solely and exclusively to Municipal Improvement Bonds issued under special assessment laws of the State of California.

Section 2. Whenever and as often as the Corporation shall desire to issue any certificates and to have the same certified by said Trustee, it shall deposit with said Trustee bonds in unpaid face value equal to ONE HUNDRED AND TEN PER CENT (110%) of the par value of the certificates then to be so certified, such bonds to bear interest at a rate not less than the rate mentioned in such [31] certificates; provided, however, that the Corporation may substitute a larger amount of bonds bearing a lower rate of interest in place of part or all of such bonds hereinabove required to be deposited, on condition that the amount of annual interest due on such bonds so deposited or substituted, shall, in the aggregate, equal or exceed the aggregate amount of annual interest mentioned in such certificates.

Section 3. Said Corporation shall transfer, assign and set over to said Trustee the absolute title to said bonds, to hold in accordance with the provi-

sions of this Trust Agreement, and shall execute any and all transfers, assignments or other instruments necessary to pass the title in said bonds to said Trustee.

Article III.

WITHDRAWAL AND SUBSTITUTION OF BONDS:

Section 1. The Corporation, may when not in default on any of its covenants herein contained, and when no default exists in the payment of the principal or interest of any certificates at any time certified and outstanding hereunder, withdraw from time to time any of the bonds delivered to the Trustee hereunder, upon delivery to such Trustee of an equal amount in unpaid face value of bonds of the same character, provided that Section 2 of Article II hereof, shall apply to such new bonds so deposited.

Section 2. The Corporation, upon presentation by it to the Trustee for cancellation of any outstanding certificates, may withdraw bonds, the unpaid face value of which equals the par value of the certificates presented for cancellation, or in lieu thereof may have new certificates of the same par value certified by said Trustee.

Section 3. Said Corporation shall be entitled to the delivery from said Trustee of any bonds in the hands of said Trustee, over and above ONE HUNDRED AND TEN PER CENT (110%) of the par

value of certificates certified and outstanding, subject to the provisions of said Section 2 of Article II.

Section 4. Whenever and as often as the Trustee shall receive in cash the principal or any installment of the principal from any bond on deposit with said Trustee, said Trustee shall demand of said Corporation and said Corporation shall immediately deposit with said Trustee, bonds of unpaid face value equal to the amount of such cash, whereupon said Corporation shall be entitled to receive such cash from the hands of said Trustee.

Article IV.

COLLECTION OF INSTALLMENTS UNDER BONDS:

Section 1. So long as said Bonds shall remain in the possession of said Trustee, no one shall be entitled to access thereto, except the said Trustee, and nothing herein contained or in the certificates issued by said Corporation shall entitle the holder thereof, so long as he does not surrender such certificate for cancellation in exchange for bonds, as herein provided, to the possession of any of such bonds or to any installment coupons thereto attached. [32]

Section 2. Said Trustee shall, on the second days of January and July in each year, cut off or cause to be cut off all installment coupons for interest then due on the bonds on deposit with said Trustee (the same being herein referred to as the avails

from such bonds), which interest-coupons said Trustee shall collect or cause to be collected for the benefit of this Trust. Said Trustee may deliver such interest-coupons to said Corporation as the Agent of said Trustee for the purpose of collecting same, and said Corporation agrees to make such collections. The ownership of such interest-coupons, after the same are delivered to said Corporation for collection and the money collected thereon by said Corporation, shall always belong to said Trustee for the benefit of this Trust. Said Corporation agrees to account to said Trustee on or before April first for all collections from interest-coupons maturing the 2nd day of January next preceding and on or before October first for all collections from interest-coupons maturing the second day of July next preceding. Said Corporation agrees to purchase from said Trustee on the first days of April and October in each year, all interest-coupons which have not theretofore been collected by either said Trustee or by said Corporation as the Agent of said Trustee, and said Corporation agrees to pay to said Trustee in cash the amount of the face value of all such interest coupons so purchased.

Section 3. Said Trustee shall, on the second day of January in each year, cut off or cause to be cut off all installment coupons of principal then due on the bonds on deposit with said Trustee, and sell such coupons to said Corporation in the manner herein mentioned. Likewise on the second day of July in each year, said Trustee shall take all matur-

ing serial bonds, and sell the same to said Corporation in the manner herein mentioned. Said Corporation agrees to purchase such maturing coupons of principal and such maturing serial bonds in the following manner: For each maturing coupon covering an installment of principal due on such bond or bonds, or for each maturing serial bond, the said Corporation shall deliver to said Trustee other bonds of an unpaid face value equal to the amount of such coupon or maturing serial bond, and shall be entitled to receive in exchange such coupons and serial bonds. The coupons covering installments of principal or serial bonds may be added to other like coupons or serial bonds and be received by said Corporation upon the delivery by said Corporation of one or more bonds, which in the aggregate in unpaid face value shall equal the aggregate of such serial bonds and coupons covering installments of principal.

Section 4. Nothing herein contained shall deprive the said Trustee of its right to collect the coupons attached to said bonds, or any serial bonds as and when the same mature, and in case of the failure of said Corporation to purchase said coupons or serial bonds as hereinabove provided, the said Trustee may proceed and collect said coupons or serial bonds for the benefit of this Trust.

Section 5. The bonds deposited with said Trustee by said Corporation in exchange for said installment coupons of principal or for maturing serial bonds, shall be held by said Trustee for the benefit

of the certificate holders, in place of the principal paid upon said bonds, to the end that said principal shall be immediately deemed to be reinvested in such new bonds so deposited by said Corporation, and the interest to accrue on such new bonds shall be deemed to be for the benefit of the holders of certificates then certified and outstanding, to the extent herein specified. [33]

Section 6. The intent and purpose of this Article, is that the Trustee shall collect the interest accruing from all bonds deposited by said Corporation under this Trust Agreement, for the benefit of this trust, and that as the principal under such bonds matures the same shall be immediately reinvested by said Trustee in like bonds, the interest from which shall likewise be for the benefit of this trust.

Article V.

DISTRIBUTION BY TRUSTEE OF COLLECTIONS:

Section 1. Out of the money that the said Trustee receives from the collection or sale of interest coupons on the bonds on deposit with said Trustee, the said Trustee shall, upon presentation of coupons as they mature from all certified and outstanding certificates, pay the amount due on such coupons and charge the same to said Trust, retaining the said coupons as the Trustee's voucher therefor, and out of the balance of the money so collected, after the Trustee has deducted its charges as herein specified, the said Trustee shall pay the

balance to the Corporation as income to said Corporation on the excess ten per cent of bonds deposited with said Trustee and as compensation to said Corporation in selling said certificates and in collecting the installments of principal and interest due under said bonds.

Section 2. Said Corporation shall likewise be entitled to any bonus or penalty received by said Trustee upon the payment of any bond on deposit with said Trustee.

Article VI.

PAYMENT OF CERTIFICATES AND COUPONS ON MATURITY:

Section 1. In order to pay to the holders of any maturing certificate or certificates the principal sum therein stated, said Trustee shall, on the day prior to the maturity of such certificates, sell such amount of bonds on deposit with said Trustee, the unpaid face value of which shall equal the principal sum stated in such maturing certificates, and said Corporation agrees, upon such sale, to purchase from said Trustee said bonds and to pay in cash therefor the unpaid face value thereof.

Section 2. Out of the avails received by said Trustee from the collection or sale of the interest-coupons on the bonds on deposit with said Trustee, the said Trustee shall pay upon presentation, all coupons as they mature from all certified and outstanding certificates.

Section 3. Out of the proceeds received by said Trustee from the sale of bonds to said Corporation as hereinabove provided, the Trustee shall, upon presentation for cancellation of any certificate or certificates at maturity, pay to the holder thereof the principal sum stated in such certificates.

Section 4. Nothing in this Article contained shall preclude the holder of any certificate from demanding and receiving at maturity, in lieu of cash, bonds of the unpaid face value equal to the principal sum stated in such certificate. [34]

Article VII.

PRESENTATION OF CERTIFICATES PRIOR TO MATURITY:

Section 1. Upon presentation to the Trustee of any certified and outstanding certificate for cancellation prior to its maturity, and upon demand of the holder thereof for the delivery of bonds according to the terms of said certificate, the Trustee shall select from the bonds on deposit with said Trustee, such bonds as it may deem expedient, either as to maturity or as to security, of the unpaid face value equal in amount, as near as possible, to the par value of said certificates so surrendered.

Section 2. Accrued interest shall be computed on both the bonds so delivered and upon the certificate presented for cancellation, in arriving at the value of each respectively. In case the amount of the certificate and accrued interest cannot be cov-

ered exactly by bonds, the difference, if any, may be adjusted by the payment of the difference in cash, either by the Trustee to the certificate holder, or by the certificate holder to the Trustee, as the case may be, but in any event the certificate holder shall not be obliged to accept bonds of a greater unpaid face value than the certificate presented for cancellation. Any cash paid by said Trustee under this Section, shall be charged against whatever money may be due said Corporation under Article V of this Agreement. Any cash received by said Trustee under this Section, shall be immediately reinvested by said Trustee in bonds and said Corporation agrees to immediately deliver to said Trustee, in exchange for such cash, bonds of equal unpaid face value, and such bonds shall be held for the benefit of this Trust.

Section 3. Upon delivery by said Trustee to said certificate holder of such bonds and the acceptance of same by such certificate holder, the said Corporation shall be relieved from all guarantees under such certificate, and from all guarantees hereunder as to such bonds so delivered.

Article VIII.

TITLE TO BONDS:

Section 1. It is the intention of the parties hereto that the delivery to the purchaser thereof of a certified certificate, vests in the holder of such certificate the ownership of an amount in unpaid face value bonds, equal to the par value of the certificate,

subject to the implied agreement on the part of the purchaser of such certificate by the acceptance thereof, to allow the said bonds to remain in the hands of the Trustee for collection under the terms and conditions of this Trust, and also subject to the release and waiver by the holder thereof of all interest, bonuses, penalties or other sums collected by said Trustee upon the bonds so deposited with said Trustee, in excess of the principal sum mentioned in such certificate and the interest and the interest on such principal sum at the rate specified in said certificate.

Section 2. It is understood that the coupons attached to the certificate, represent the full amount of interest to which the holder thereof is entitled, in lieu of the interest accruing on the bonds, represented by said certificate, so long as the holder or holders thereof elect to allow said bonds to remain in the hands of the Trustee for collection. [35]

Section 3. The excess in face value of bonds over and above the par value of the certified and outstanding certificates, to-wit: ten per cent (10%), belongs to the Corporation, and the Trustee is authorized to hold the said excess during the life of this Trust, and to use the same, if necessary, in satisfying any obligations of the said Corporation to certificate holders or to said Trustee, arising through the operation of this Trust.

Article IX.

TRANSFER AND REGISTRATION OF CERTIFICATES:

Section 1. The certificates, as certified by said Trustee, may be transferred without endorsement (if not registered), and shall pass to the transferee all of the purchaser's right therein and the purchaser's title to the bonds deposited with said Trustee to cover such certificate, and the holder of such certificate shall have all the right, title and interest vested in the original purchaser thereof.

Section 2. The holder of any certificate may present the same to the Trustee for registration in the name of the holder thereof, whereupon said certificate so registered shall be payable upon maturity, as to principal, only to the registered holder thereof, upon surrender of such registered certificate, or such registered holder alone shall, prior to maturity, be entitled to demand and receive, upon surrender of such registered certificate, bonds deposited with said Trustee to cover such certificate. When such certificate is presented to said Trustee for registration, the said Trustee shall stamp thereon in substance the following: "This Certificate is registered in the name of.....subject to the provisions of Trust Agreement mentioned herein." Such registration shall apply to the principal only and not to the interest coupons thereto attached. The fee of the Trustee for such registry shall be paid by the person presenting the certificate for

registration, and the Corporation shall not be liable for such fee.

Article X.

WARRANTIES AND COVENANTS OF CORPORATION:

Section 1. The Corporation, in joining in the execution of this Trust Agreement, hereby warrants that each and every bond deposited by said Corporation with said Trustee for the benefit of the holders of certificates, is a legal, valid and subsisting obligation and is secured by the property described therein and that the installments of principal and interest specified in each of such bonds will be paid as and when the same mature. Said Corporation further covenants that the aggregate unpaid principal of all bonds on deposit with said Trustee hereunder, shall at all times equal or be in excess of the par value of all certified and outstanding certificates, and that the value of the maturing coupons on such bonds shall at the date of the maturity of each and every coupon attached to such certificates, be equal to or in excess of the interest mentioned in such coupons attached to such certificates.

Section 2. In case any of such bonds be declared invalid or in case any installment of principal or interest is not paid according to the terms of any such bond, said Corporation agrees, to substitute for such bonds new valid and legal bonds of equal unpaid face value. [36]

Section 3. Said Corporation hereby covenants and agrees with said Trustee and with each and every holder of certified and outstanding certificates, to keep and perform every agreement on its part to be kept and performed hereunder, and each such certificate holder may enforce such agreements herein made by said Corporation.

Section 4. Said Corporation covenants and agrees that at the time of each and every deposit of bonds with said Trustee under the various Sections and Articles of this Trust Agreement, said Corporation will deliver into the hands of said Trustee the written opinion of a reputable attorney (such attorney to be satisfactory to said Trustee), certifying that such bonds are in the opinion of said attorney legally issued and are valid and subsisting liens upon the property described in such bonds. Until such written opinion, as to the validity of bonds offered for deposit, is filed with the Trustee, said Trustee shall refuse to accept any such bonds, so offered for deposit under the provisions hereof.

Article XI

RESPONSIBILITY OF TRUSTEE:

Section 1. The Trustee in accepting this Trust, shall assume no liability or responsibility for the due execution or the validity of any certificates issued by said Corporation, and the recitals herein and in the said certificates are made by and on behalf of the Corporation and the Trustee shall not

be responsible for the correctness thereof; nor shall the Trustee in any way be liable for any breach by the Corporation of its covenants and agreements herein contained, or for any other act or omission hereunder, excepting the Trustee's own wilful negligence, omission or intentional wrongdoing.

Section 2. The Trustee assumes no liability or responsibility other than the following: The due certification of the said certificates upon receipt of the requisite amount of bonds covering the same; the due and safe keeping and delivery of said bonds; the sale or collection of said bonds and the coupons attached thereto and the distribution of the proceeds and avails therefrom; the delivery of bonds to the holders of certificates upon surrender thereof prior to maturity, and the delivery of bonds or the proceeds from the sale of bonds to such certificate holders upon maturity of such certificates; the return of bonds to the Corporation in exchange for other bonds, or upon surrender of any certified and outstanding certificates; and a proper accounting of all moneys received by said Trustee.

Section 3. The Trustee shall be charged only with a fair and reasonable effort to obtain the best price for said bonds, in case of a sale thereof to others than said Corporation, and nothing contained herein shall be taken as binding the Trustee to any guarantee of the payment of the certificates or of any coupon attached thereto or the fulfillment of any agreement on the part of the Corporation,

or to any guarantee that the bonds deposited by said Corporation are legal, valid, or subsisting obligations or that such bonds and the interest thereon will be paid.

Section 4. It is distinctly understood that if any remedy exists because of the breach by said Corporation of any of its agreements herein or of any guarantee made to purchasers of said certificates, such remedy shall inure to the benefit of the holders of such certificates and may be enforced by them, and the Trustee shall be under no obligation hereunder to take any action relative thereto. [37]

Section 5. The Trustee shall be entitled to the following fees for its services:

For accepting the trust, the sum of.....

For certifying each certificate the sum of FIFTY CENTS (50c).

For paying maturing coupons and certificates ONE-FOURTH (¼) of ONE PER CENT (1%) of the cash paid thereon. No charge shall be made for the deposit of bonds in exchange for other bonds or for coupons covering installments of principal, or for the delivery of bonds upon surrender of certified and outstanding certificates, or for any other services rendered by said Trustee. The Trustee shall be entitled to be reimbursed for all proper and reasonable outlays of any sort or nature by it incurred in the discharge of its duties hereunder, and in case it is made a party to any actions involving this Trust or the bonds on deposit, it shall be entitled to court costs and reasonable attorney's

fees therein. The said Corporation hereby agrees to indemnify the Trustee for any costs, expenses or loss which it may suffer by reason of its position as Trustee, other than the ordinary expenses incurred by said Trustee in the regular administration of such Trust, payment for which ordinary expenses is herein agreed upon, and said Corporation agrees, upon demand, to pay such costs, expenses or loss which said Trustee may so suffer.

IN WITNESS WHEREOF, on the day and year first above written, ...and..... have caused this instrument to be executed by their respective officers thereunto duly authorized.

.....

By.....
President

By.....
Secretary

.....

By.....
President

By.....
Secretary

NO.

UNITED STATES OF AMERICA
STATE OF CALIFORNIA
MUNICIPAL BOND COMPANY
CONVERTIBLE CERTIFICATE OF OWNERSHIP
IN MUNICIPAL IMPROVEMENT BONDS
SERIES.....[38]

FOR VALUE RECEIVED, ..., a corporation, (hereinafter referred to as the "Corporation"), does hereby sell and transfer to the purchaser of this certificate all of its rights, title and interest in Municipal Improvement Bonds issued under the special assessment laws of the State of California (hereinafter referred to as "Bonds"), of the unpaid face value of.....Dollars (.....), and said Corporation hereby certifies that said bonds with other like bonds are now deposited with.....(hereinafter referred to as the "Trustee"), as Trustee, to hold the same under a certain Trust Agreement, dated the.....day of.....and that the bearer hereof, or if this certificate be registered, the registered holder hereof, is entitled to participate in the proceeds and avails of such bonds, so deposited, to the extent of the principal sum of .....Dollars, payable from such proceeds and avails on the.....day of.....19.., with interest on said sum from the date hereof at the rate of .....Per Cent (%) per annum, payable semi-annually on the first days of.....and.....in each year upon surrender of the coupons hereto

attached, as they severally mature, said principal and interest to be paid in lawful money of the United States at the office of said Trustee in Los Angeles, California; or the bearer hereof or such registered owner, is entitled at any time upon demand and the surrender of this certificate, together with its unmatured coupons, to said Trustee, to receive bonds of unpaid face value equal to the principal sum herein mentioned, the accrued interest to be adjusted as of date of delivery on both this certificate and the bonds so delivered.

This certificate is one of an issue of MUNICIPAL BOND COMPANY Convertible Certificate of Ownership in Municipal Improvement Bonds Series .....all of like date and tenor, except variations necessary to express their numbers and denominations, issued and to be issued to an amount not exceeding in the aggregate the principal sum of Two Hundred Thousand ($200,000) Dollars under said Series, pursuant to the provisions of and to be equally secured by the above mentioned Trust Agreement.

By the acceptance of this certificate, the bearer or registered owner hereof releases and waives all interest or other sums collected by said Trustee upon such bonds in excess of the principal sum herein mentioned and interest thereon at the rate herein specified, and does hereby agree to all of the terms of said Trust Agreement, which is hereby made a part hereof the same as though incorporated herein.

The corporation, for the purpose of better securing the distribution of the proceeds and avails of such bonds, has deposited with said Trustee bonds of unpaid face value equal to ONE HUNDRED AND TEN PER CENT (110%) of the principal sum herein stated. The Corporation hereby covenants that such percentage shall be maintained and that the principal and interest to become due upon said bonds, when and as the same matures, will be paid. Such covenant to continue as long as such bonds remain on deposit with said Trustee.

This certificate shall not be valid until certified by the Trustee.

IN WITNESS WHEREOF, MUNICIPAL BOND COMPANY has caused this certificate to be signed by its President or Vice-President, and its corporate seal to be hereto affixed and attested by its Secretary, and the coupons hereto attached to bear a facsimile signature of its Secretary, this..... day of.....19...

MUNICIPAL BOND COMPANY
By.....

President
Vice-President.

[39]

Attest:.....
Secretary.

(Form of Coupon)

MUNICIPAL BOND COMPANY CONVERTIBLE CERTIFICATE OF OWNERSHIP IN MUNICIPAL IMPROVEMENT BONDS.

$.....

On the.....day of.....19.., THE BEARER, ON SURRENDER HEREOF TO THE..... IS ENTITLED TO RECEIVE.....Dollars from the avails of Bonds on deposit with said Bank in Trust No....., according to the terms of such Trust, and the Undersigned covenants that the avails from such Bonds will be paid.

.....

By.....

Secretary.

Series.....
No.....

TRUSTEE'S CERTIFICATE

The undersigned hereby certifies that the within certificate and coupons attached, is one of the certificates executed by MUNICIPAL BOND COMPANY under an Agreement of Trust with this Corporation, dated.....

The Trustee further certifies that there has been deposited with it bonds of the character designated in said Trust Agreement, of unpaid face value to

the amount of 110% of the principal sum stated in the within certificate.

. . . . . .

. . . . . .

[40]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and Clay C. Holmes, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review (hereinafter referred to as the taxpayer) is a corporation created under the laws of the State of California, with its principal place of business in Los Angeles, California.

Income tax returns for the years 1926, 1927 and 1928 were duly filed by the tax- [41] payer with the Collector of Internal Revenue for the Sixth District of California, and the office of the Collector of Internal Revenue for said Sixth District is located within the judicial Circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner determined deficiencies for the years in question and sent notices of deficiencies under the pertinent provisions of the Revenue Acts, as follows:

Date of Letter	Year	Deficiency
January 9, 1930	1926	$2,086.02
January 9, 1930	1927	$1,780.08
January 28, 1931	1928	$1,815.31

Thereafter the taxpayer filed appeals from the above-mentioned notices of deficiency with the United States Board of Tax Appeals asserting error for the years 1926 to 1928 inclusive.

The hearing of said appeals was held October 2, 1933. On November 15, 1934 the Board promulgated its findings of fact and opinion in said appeals, and on January 9, 1935 the Board entered its decision and final order of redetermination in both appeals. The final order of the Board determined that there were deficiencies of $786.76 and $385.87 for the years 1926 and 1927 and no deficiency for the year 1928.

III.

The Municipal Bond Company, a California Corporation, was organized to deal in municipal bonds. To finance its operations, it deposited bonds of a certain par value with a trustee and then sold to investors certificates of interest. [42]

The deficiencies in controversy resulted from the determination of the Commissioner that interest received by the taxpayer on certificates of ownership issued by the Municipal Bond Company constituted interest on obligations of that company, and as such was subject to Federal Income Tax. The taxpayer contended that the interest was exempt from tax and in this contention was sustained by the Board of Tax Appeals which held that the taxpayer became the beneficial owner of the municipal bonds deposited with the trustee and that interest received, through the trustee, was in payment of interest on those bonds and therefore, exempt from Federal Income Tax.

IV.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner assigns the following errors and each of them, which he avers occurred in said record, proceedings, decision and final order of redetermination, and

upon which he relies to reverse said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

1. The Board of Tax Appeals erred in holding and deciding that interest income received by the taxpayer was exempt from Federal Income Tax.

2. The Board of Tax Appeals erred in failing to hold and decide that the interest income received by the taxpayer was not exempt from Federal Income Tax. [43]

3. The Board of Tax Appeals erred in holding and deciding that a valid irrevocable trust in municipal bonds was created by the instruments executed by the parties under which taxpayer acquired Municipal Bond Company's certificates.

4. The Board of Tax Appeals erred in failing to hold and decide that a valid irrevocable trust in municipal bonds was not created by the instruments executed by the parties under which taxpayer acquired Municipal Bond Company's certificates.

5. The Board of Tax Appeals erred in holding and deciding that the interest received by taxpayer from certificates of ownership of the Municipal Bond Company was interest exempt from Federal Income Tax.

6. The Board of Tax Appeals erred in failing to hold and decide that the interest received by taxpayer from certificates of ownership of the Municipal Bond Company was not interest exempt from Federal Income Tax.

7. The Board of Tax Appeals erred in holding and deciding that upon the purchase of certificates of ownership of the Municipal Bond Company taxpayer became the beneficial owner of the deposited bonds.

8. The Board of Tax Appeals erred in failing to find and hold that upon the purchase of certificates of ownership of the Municipal Bond Company taxpayer did not become the beneficial owner of the deposited bonds.

9. The Board of Tax Appeals erred in finding and holding for the taxpayer.

10. The Board of Tax Appeals erred in failing to find and hold for the Commissioner. [44]

11. The Board of Tax Appeals erred in finding and holding that there were deficiencies of $786.78 and $385.87 for the years 1926 and 1927 respectively, and no deficiency for the year 1928.

12. The Board of Tax Appeals erred in failing to find and hold that there were deficiencies of $2,086.02, $1,780.08 and $1,815.31 for the years 1926, 1927 and 1928 respectively.

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate

action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN,
Assistant Attorney General.
(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
CLAY C. HOLMES,
Special Attorney, Bureau of Internal Revenue.
[45]

United States of America
District of Columbia—ss.

CLAY C. HOLMES, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) CLAY C. HOLMES.

Sworn and subscribed to before me this 25th day of March, 1935.

(Sgd) GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 16, 1937. [46]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To:

Joseph D. Brady, Esq.,
Roman Building,
Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 25th day of March, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 25th day of March, 1935.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29 day of March, 1935.

(Sgd) JOSEPH D. BRADY,
Attorney for Respondent on Review.

[Endorsed]: Filed Apr. 8, 1935. [47]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To:

Carson Estate Company,
1119 Bank of America Bldg.,
Los Angeles, California.

Corrected address: 815 Los Angeles Stock Exchange Office Bldg., Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 25th day of March, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 25th day of March, 1935.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review

and assignments of error mentioned therein, is hereby acknowledged this 29 day of March, 1935.

(Sgd) CARSON ESTATE CO.,
By H. H. COTTON, Secy.
Respondent on Review.

[Endorsed]: Filed Apr. 8, 1935. [48]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

Wave Millar, being duly sworn, deposes and says that she is over the age of 18 and is not a party to the above-entitled proceeding.

That on April 2, 1935, at 12:15 P.M., she placed a notice of filing petition for review and a copy of petition for review, in the above-entitled proceeding in a franked envelope and addressed said envelope to Mr. Harvey Stevenson, 1009 Security Building, 5th & Spring Streets, Los Angeles, California; that she thereupon caused a registry stamp to be affixed to said envelope and deposited the same in the United States mails at Station No. 24 of the United States Post Office, Los Angeles, California.

WAVE MILLAR.

Subscribed and sworn to before me this Third day of April, 1935.

[Seal] T. G. ALBRIGHT,
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires Oct. 22, 1936.

[Endorsed]: Filed Apr. 8, 1935. [49]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board:

(a) Petitions, including the annexed copies of the deficiency letters.

(b) Answers.

3. Opinion and decision of the Board.

4. Stipulation filed with the Board May 10, 1930.

5. Stipulation of Facts and attached Exhibit A.

6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

7. This praecipe.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 6th day of May, 1935.

JOSEPH D. BRADY,
Attorney for Respondent.

[Endorsed]: Filed May 14, 1935. [50]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 50, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 14th day of June, 1935.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 7900. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Carson Estate Company, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed June 21, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7900

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CARSON ESTATE COMPANY, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
ELLIS N. SLACK,
Special Assistants to the Attorney General.

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CITATIONS

34958—35——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7900

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CARSON ESTATE COMPANY, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 23–35), which is reported in 31 B. T. A. 607.

JURISDICTION

This appeal involves income taxes for the years 1926, 1927, and 1928 in the amounts of $1,299.24, $1,394.21, and $1,815.31, respectively, and is taken from a decision of the Board of Tax Appeals entered January 9, 1935 (R. 36). The case is brought to this Court by petition for review filed March 25,

1935 (R. 5), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTION PRESENTED

A private corporation deposited tax-free municipal obligations with a trustee and issued certificates of ownership which bore interest at a lesser rate than the bonds so deposited. Is the interest received by the holders of such certificates exempt from tax as an obligation of a State, Territory, or political subdivision thereof?

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part as follows:

> SEC. 213 (b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * *
>
> (4) Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia;
>
> * * *

Section 22 (b) (4) of the Revenue Act of 1928, c. 852, 45 Stat. 751, reads the same as Section 213 (b) (4) of the Revenue Act of 1926.

Treasury Regulations 69, promulgated under the Revenue Act of 1926, provide in part as follows:

ART. 74. *Interest upon State obligations.*—Interest upon the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia is exempt from the income tax. Obligations issued by or on behalf of the State or Territory or a duly organized political subdivision acting by constituted authorities empowered to issue such obligations, are the obligations of a State or Territory or a political subdivision thereof. The term "political subdivision" denotes any division of the State or Territory made by the proper authorities thereof acting within their constitutional powers. Political subdivisions of a State or Territory, within the meaning of the exemption, include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of a State or Territory. The purchase by a State of property subject to a mortgage executed to secure an issue of bonds does not render the bonds obligations of the State, and the interest upon them does not become exempt from taxation whether or not the State assumes the payment of the bonds.

ART. 1541. *Dividends.*—Dividends for the purpose of Title II comprise any distribution in the ordinary course of business, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of its earnings or profits accumu-

lated since February 28, 1913. Although interest on State bonds and certain other obligations is not taxable when received by a corporation, upon amalgamation with the other funds of the corporation such income loses its identity and when distributed to shareholders in dividends is taxable to the same extent as other dividends.

STATEMENT

The facts may be summarized as follows (R. 38–64):

The respondent, during the years 1926, 1927, and 1928, was the owner of certain ownership certificates issued by the Municipal Bond Company, a private corporation (hereafter referred to as the corporation), and as such owner it received during the said years interest upon such certificates as follows (R. 38–39):

1926	$9,624.01
1927	10,327.50
1928	12,127.51

The ownership certificate issued by the corporation provides that the corporation "does hereby sell and transfer to the purchaser of this certificate all of its rights, title, and interest in Municipal Improvement Bonds issued under the special assessment laws of the State of California", of a specified unpaid face value; that the corporation certifies that such bonds and other like bonds are deposited with a named trustee to hold the same under a trust agreement made a part of the certificate as

though incorporated therein; that the bearer or registered holder of the certificate "is entitled to participate in the proceeds and avails of such bonds, so deposited, to the extent of the principal sum of _____ Dollars, payable from such proceeds and avails on the ____ day of _____ 19____, with interest on said sum from the date hereof at the rate of __ Per Cent (__%) per annum, payable semiannually on the first days of _____ and _____ in each year upon surrender of the coupons hereto attached, as they severally mature"; that the owner of the certificate "is entitled at any time upon demand and surrender of this certificate, together with its unmatured coupons, to said trustee, to receive bonds of unpaid face value equal to the principal sum herein mentioned, the accrued interest to be adjusted as of date of delivery on both this certificate and the bonds so delivered" (R. 60–61).

It also provides that the certificate owner "releases and waives" all interest or other sums collected by the trustee upon such bonds, in excess of the principal sum and interest at the rate specified in the certificate. The corporation has deposited with the trustee, unpaid face value bonds equal to 110% of the principal sum stated in the certificate, "for the purpose of better securing the distribution of the proceeds and avails of such bonds"; that the corporation covenants "that the principal and interest to become due upon said bonds,

when and as the same mature, will be paid. Such covenant to continue as long as such bonds remain on deposit with said Trustee." The certificate is signed by the president or vice-president of the corporation and attested by its secretary (R. 61–62).

The form of the coupon attached to the certificate provides that the certificate owner "is entitled to receive _____ Dollars from the avails of Bonds on deposit with said Bank in Trust No. ____, according to the terms of such Trust, and the Undersigned [the corporation] covenants that the avails from such Bonds will be paid." Such coupon is signed by the secretary of the corporation (R. 63).

The trust agreement (R. 40–59) sets forth in detail the terms and conditions of the trust, the duties and obligations of the trustee and the corporation, and the rights of the parties, but in the interest of brevity its provisions will not be set forth here.

The ownership certificates owned by the respondent bore interest at the rate of 6%, while the municipal improvement bonds which were deposited with the trustee all bore interest at the rate of 7% (R. 39).

SUMMARY OF ARGUMENT

The certificates recite an absolute sale of the bonds, but qualify this by making the trust instrument a part of the certificates to the same extent as though incorporated therein. The effect of the transaction must be determined by an analysis of

the provisions of the certificates and the trust agreement, read together as a whole, regardless of the name by which the transaction may be labeled by the parties.

The provisions of the trust agreement are inconsistent with the theory that the certificate holder is the owner of any of the bonds deposited with the trustee. Subject to the obligation to maintain bonds sufficient to comply with the trust agreement, the corporation has every right of ownership. It has even greater property rights than an ordinary pledgor. It seems clear that the obligation of the certificate is the obligation of the corporation, and that all the certificate holder acquires is a lien securing to him the payment of the principal sum covered by the certificate and interest. The right to exchange the certificate for bonds is merely an option, and until exercised does not confer ownership. The transaction represents nothing more than a loan on the part of the certificate holder and a promise by the corporation to repay such loan upon its maturity.

The situation presented here is analagous to the case of where tax-exempt interest is received by a corporation and later distributed to its stockholders as a dividend. In such a case there is no question but that the dividend is taxable.

Finally, Section 213 (b) (4) grants an exemption from taxation and it therefore should be strictly construed.

34958—35——2

ARGUMENT

Section 213 (b) (4) of the Revenue Act of 1926 and the corresponding section of the Revenue Act of 1928 provide that there shall be exempt from tax interest upon the obligation of a State, Territory, or any political subdivision thereof.

The respondent claims that the interest which it received from the ownership certificates issued by the Municipal Bond Company represents in effect, interest upon the obligation of a political subdivision of a State, and therefore is exempt from tax. It is our position that the interest received by the respondent does not come within the exemption provided by the statutes for the reason that it constituted interest upon the obligations of a private corporation.

A proper solution of the question requires a construction of the trust instrument and the ownership certificates issued thereunder. The certificates recite an absolute sale but qualify this by making the trust instrument a part of the certificates to the same extent as though incorporated therein. The provisions of the trust agreement which is thus made a part of the certificates are inconsistent with the theory that the bonds are sold and the title conveyed to the certificate holders. The ultimate purpose and effect of the transaction must be determined from an analysis of the provisions of the certificates and the trust instrument read as a whole, regardless of the name by which the trans-

action may be labelled by the parties. *Heryford* v. *Davis,* 102 U. S. 235.

Article II of the trust agreement (R. 44–45) provides that the corporation may substitute a larger amount of bonds bearing a lower rate of interest on condition that the interest on the bonds so substituted shall equal the aggregate interest mentioned in the certificates. Article III, Section 1 (R. 15), provides that the corporation may withdraw any or all of the bonds so deposited with the trustee upon delivery to the trustee of an equal amount of bonds of the same character. Section 3 (R. 45–46) provides that whenever the trustee receives in cash the principal or any installment of the principal from any bond on deposit, the corporation shall immediately deposit with the trustee bonds equal to the amount of such cash, whereupon the corporation shall be entitled to receive such cash from the trustee. Thus, subject to the obligation to maintain bonds sufficient to comply with the trust instrument, the corporation has every right of ownership. It has even greater property rights than an ordinary pledgor.

Article IV (R. 47–48) provides that the corporation is the agent of the trustee for the purpose of collecting the interest coupons; that the corporation agrees to purchase from the trustees on the first day of April and October of each year all interest coupons which have not theretofore been collected; that the trustee shall sell to the corporation all ma-

turing coupons of principal, and such coupons shall be paid for by the delivery by the corporation to the trustee of other bonds of a face value equal to the matured coupons of principal. From the above it seems clear that it was in fact the intention of the parties that no title to the bonds, legal or equitable, should vest in the certificate holder by virtue of the issuance of the certificate. It is true the certificate provides that the holder is entitled at any time, upon surrender of the certificate, to receive bonds of a face value equal to the principal of the certificate. But it will be observed that the holder is not entitled to any particular type or issue of bonds, but only such bonds as may be selected by the trustee. Article VII (R. 51–52) provides that "the Trustee shall select from the bonds on deposit with said Trustee, such bonds as *it may deem expedient*, either as to *maturity* or as to *security,* of the unpaid face value equal in amount, as near as possible, to the par value of said certificates so *surrendered.*" (Italics supplied.) Such a provision is inconsistent with the idea that the certificate holder is the owner of any of the bonds.

Furthermore, the corporation is entitled to all interest collected by the trustee in excess of the amount required to pay the certificate holders. The agreement recites that the excess interest is to compensate the corporation for the excess 10% of bonds which are deposited with the trustee, but in this connection it will be observed that the certificate

holders receive interest at the rate of 6% while the municipal bonds deposited with the trustee bear interest at the rate of 7%. Also, the corporation is entitled to any bonus or premium that may be received upon the maturity of any of the bonds. Obviously, if the bonds held by the trustees were owned by the certificate holders they would be entitled to all the interest received from such bonds, less, of course, the expenses of the trustee. Also, the corporation would not be entitled to any profit upon their redemption.

Taking the trust agreement and the certificates together, and reading them as a whole, it seems clear that the certificate holder merely acquires a lien securing to him the payment of the principal sum covered by the certificate and interest, together with the right at his election to exchange his certificate for bonds to be selected by the trustee. This latter right is merely an option, and until exercised, does not confer ownership. *Western Union Tel. Co.* v. *Brown,* 253 U. S. 101.

The obligation of the certificate is the obligation of the corporation. This is borne out by the fact that the certificate is signed in the name of the corporation and attested by its secretary, and the further fact, as mentioned above, that the corporation may substitute other bonds for those on deposit and is entitled to any increase in value. If the certificate is retained by the holder and not surrendered in exchange for bonds, the full amount of

the obligation, both principal and interest, will be retired upon maturity by funds produced by the corporation. Such is the obligation of the corporation regardless of any increase or decrease in the value of the bonds and regardless of the amount of any proceeds, principal or interest, derived therefrom. The certificate holder is entitled to the payment in full of the principal sum represented thereby with interest and nothing more. The certificate, when considered in connection with the terms of the trust agreement, represents nothing more than a loan on the part of the certificate holder and a promise by the corporation to repay such loan upon its maturity. This was the intention of the parties, and this was the legal effect of their transaction.

The situation presented in the instant case is no different, in substance, than if the corporation had secured a loan from a bank and deposited, as security for such loan, tax-free municipal bonds. We think in such a case no one would seriously argue that the interest paid by the corporation on the loan was tax-free in the hands of the bank.

A case quite similar to the instant one is *First Nat. Bank in Wichita* v. *Commissioner,* 57 F. (2d) 7 (C. C. A. 10th). There, as here, the agreement recited a sale, but the court held that the interest received was taxable, saying (p. 9):

> It is contended that the written contract made by the parties when the bonds were de-

> livered passed legal title to the bonds in the bank, and by force thereof interest on them was the bank's property. There is no doubt that the form of contract might have been carried out in that way, but the blanks in the contract submitted to the comptroller left an opportunity to the bank of which it availed itself, and the practice as carried on by the parties clearly shows that it was never intended that the bank should be entitled to the interest accruing on the bonds. Conceding that under the contract the legal title to the bonds was in the bank, the uniform conduct and practice of the parties was a joint admission that the interest coupons and their proceeds when collected did not belong to the bank, but were the property of Brown-Crummer Company. They were collected by Brown-Crummer Company and applied to its use and benefit.

Attention is invited to the fact that there is nothing in the trust instrument or the certificate to show that the certificate holder knew the kind, amount, interest rate, maturity, name of obligor, or any other pertinent fact relating to the bonds deposited with the trustee. All that is shown is that bonds issued under the special assessment laws of the State of California have been deposited with the trustee and that the corporation guarantees the payment of the principal and interest of such bonds.

The reason for the enactment of Section 213 (b) (4) of the Revenue Act of 1926 and the corre-

sponding provisions of the Revenue Act of 1928 is well known. For a tax upon the interest of an obligation of a State, Territory, or political subdivision thereof would be a tax upon a State's borrowing power, and therefore unconstitutional. *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Willcuts* v. *Bunn,* 282 U. S. 216. But we are not confronted with that constitutional prohibition because the bonds here involved had been issued and sold by a political subdivision of the State prior to the time they were deposited with the trustee. At that time the State had received its money and was no longer concerned with the ownership of the bonds. While the interest here involved may have been paid out of funds received as interest upon the obligations of a State or one of its political subdivisions, it lost its identity when collected by the corporation and represents taxable interest in the hands of the certificate holders.

The situation presented here is not materially different than those cases where tax-exempt interest is received by a corporation and later distributed to its stockholders as a dividend. In such a case there is no question but that the dividend is taxable. Article 1541 of Regulations 69 and Article 621 of Regulations 74.

Finally, it is urged that since Section 213 (b) (4) grants an exemption from taxation, the exemption should be strictly construed. *Pacific Co.* v. *Johnson,* 285 U. S. 480; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232; *Cornell* v. *Coyne,* 192 U. S. 418.

CONCLUSION

It follows that the decision of the Board of Tax Appeals is wrong, is not in accordance with law, and should be reversed.

Respectfully submitted.

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DECEMBER 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1936

No. 7900.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Commissioner of Internal Revenue,
Petitioner,

vs.

Carson Estate Company,
Respondent.

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

BRIEF FOR RESPONDENT.

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No. 7900.

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ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

BRIEF FOR RESPONDENT.

Opinion Below.

The only previous opinion in this case is that of the Board of Tax Appeals [R. 23-35], which is reported in 31 B. T. A. 607.

Jurisdiction.

This appeal involves income taxes for the years 1926, 1927 and 1928 in the amounts of $1,299.24, $1,394.21 and $1,815.31, respectively, and is taken from a decision of the Board of Tax Appeals entered January 9, 1935. [R. 36.] This case is brought to this court by petition for review filed March 25, 1935 [R. 5], pursuant to the pro-

visions of sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

Question Presented.

Was the Board correct in holding that the interest income here involved flowed to respondent by reason of its beneficial ownership of an undivided interest in tax-exempt municipal improvements bonds deposited in trust?

Stated otherwise, did the Board err in rejecting the Commissioner's contention that the interest in question was interest on indebtedness of Municipal Bond Company, a private corporation?

Statutes and Regulations Involved.

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part as follows:

> SEC. 213 (b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * * * * *
>
> (4) Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; * * *
>
> SEC. 234 (a) In computing the net income of a corporation * * * there shall be allowed as deductions:
>
> * * * * * * * *
>
> (2) All interest paid or accrued within the taxable year on its indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities * * * the interest upon which is wholly exempt from taxation under this title;

Section 22(b)(4) of the Revenue Act of 1928, c. 852, 45 Stat. 751, reads the same as section 213(b)(4) of the Revenue Act of 1926, and section 23(b) of the 1928 Act is substantially identical with section 234(a)(2) of the 1926 Act.

Treasury Regulations 69, promulgated under the Revenue Act of 1926, provide in part as follows:

> ART. 74. *Interest Upon State Obligations.*—Interest upon the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia is exempt from the income tax. Obligations issued by or on behalf of the State or Territory or a duly organized political subdivision acting by constituted authorities empowered to issue such obligations, are the obligations of a State or Territory or a political subdivision thereof. The term "political subdivision" denotes any division of the State or Territory made by the proper authorities thereof acting within their constitutional powers. Political subdivisions of a State or Territory within the meaning of the exemption, include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of a State or Territory. The purchase by a State of property subject to a mortgage executed to secure an issue of bonds does not render the bonds obligations of the State, and the interest upon them does not become exempt from taxation whether or not the State assumes the payment of the bonds.

Petitioner also quotes (p. 3) from Article 1541 of Regulations 69. This article, relating to dividends to stockholders of a corporation, has no proper application here—the petition for review does not contend that respondent is a *stockholder* in a corporation.

Statement.

The summary of facts contained in petitioner's brief (pp. 4-6) is, in the circumstances, sufficiently accurate and comprehensive so as to render it unnecessary for respondent to make an independent statement. Respondent should not, however, be regarded as conceding the correctness of certain of petitioner's conclusions which are reflected in his statement.

Summary of Argument.

The Board's conclusion, that respondent was the beneficial owner of an undivided interest in tax-exempt bonds, was a finding of fact, for which there was ample support in the evidence. It is, therefore, conclusive on appeal, for it cannot be fairly said that the evidentiary facts compel a finding opposed to that made by the Board.

The fallacy of the petitioner's contention is exposed when the validity of the corollary thereof is considered. The Municipal Bond Company was not indebted to respondent, and the interest received by respondent clearly was not interest on indebtedness of that company.

As shown by the stipulation of facts [R. 39], none of the interest income here involved flowed to respondent by reason of the warranties or covenants of Municipal Bond Company. The only other possible source was the tax-exempt bonds themselves, and the Board properly concluded that such interest was not taxable.

ARGUMENT.

I.

The Ultimate Question Is One of Fact and There Being Substantial Evidence to Support the Finding of the Board, Such Finding Is Conclusive on Appeal.

The judgment in the instant case can be, and, it is respectfully submitted, should be, affirmed on the authority of the decision of this court, December 5, 1935, in *Commissioner v. The Bank of California, National Association,* ..... F. (2d) ....., affirming a decision of the Board of Tax Appeals, 30 B. T. A. 556. Both the *Bank of California* case and the instant case were reviewed by the entire Board. One member of the Board dissented in that case; none dissented here. [R. 35.]

In the case cited, the Bank of California claimed to be the *owner* of certain tax-exempt bonds acquired from R. H. Moulton & Co., an investment banking firm, by bills of sale, absolute on their face. Simultaneously with the execution of the bill of sale the parties entered into a repurchase agreement.

The Commissioner asserted that although in form the transactions were purchases and sales of bonds, they were *intended* to be and were, in fact, loans of money by the Bank to Moulton & Co., secured by pledge of the bonds in question, and the bonds never were, in fact, the property of the Bank.

The Board, after reviewing the evidence said (30 B. T. A. 552, 561-2):

> "In view of the facts in the case before us, we are of the opinion that the tax-free securities belonged to petitioner and that the interest received by and ac-

> crued to the petitioner from such securities as were covered by the repurchase agreements as above set forth is exempt from taxation under the provisions of section 22(b)(4) of the Revenue Act of 1928."

Upon the Commissioner's petition to review, this court said:

> *"The issue thus presented is one of fact,* which the Board of Tax Appeals has decided in favor of respondent. The Board found that the transactions referred to were actual purchases, not loans of money secured by pledge, and that the bonds belonged to and were the property of respondent. *This finding is supported by substantial evidence and is, therefore, conclusive."* (Citing cases.) (Italics supplied.)

In the instant case, the Municipal Bond Company was in the business of acquiring and selling municipal improvement bonds, issued under special assessment laws of the State of California. Said bonds were rarely in denominations of an even sum such as $100, $500 or $1000. Instead of selling to a purchaser certain specific bonds, Municipal Bond Company was desirous of *selling* "an interest in such bonds," such as $100, $500 or $1000, and reinvesting for such purchaser the principal of such bonds, or annual installments thereof, as and when the same matured and was paid, in other like bonds, to the end that the purchaser might have his money invested in such bonds for a definite period of time, such as five years or ten years. [R. 40-41.]

In order to accomplish this purpose, Municipal Bond Company executed a trust instrument and deposited with the trustee the tax-exempt municipal improvement bonds. [R. 40-59.] It then proceeded to "sell and transfer" to

purchasers (of whom respondent was one) "all of its rights, title and interest in" the tax-exempt bonds of a certain unpaid face value. This sale was evidenced by a certificate—termed Municipal Bond Company Convertible Certificate of Ownership in Municipal Improvement bonds—executed by the Municipal Bond Company and bearing the certification of the trustee. A typical form of the ownership certificate is printed in the record. [R. 60-63.]

The Commissioner, on the theory that the transaction between Municipal Bond Company and the respondent was not what it professed to be, namely, a *sale* to respondent of an undivided interest in tax-exempt bonds deposited in trust, but was, rather, a loan by respondent to Municipal Bond Company, held that the interest income received by respondent was not received by reason of beneficial ownership in tax-exempt bonds but flowed from an obligation of the Municipal Bond Company. Accordingly, the Commissioner held that the interest was not tax-exempt to respondent.*

The Board, from the evidence before it, found that the professed background and purpose of the transaction (to *sell* an interest in tax-exempt bonds) stood uncontradicted; that there was no history or suggestion branding the Municipal Bond Company as at any time a borrower or the respondent as a lender; that the record indicated only that said parties were seller and purchaser, respectively; and that respondent was a beneficial *owner* of tax-exempt

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*Since someone *owns* the tax-exempt bonds, the necessary corollary of the Commissioner's theory is that the interest is tax-exempt to Municipal Bond Company. The unsoundness of this corollary will be demonstrated under Point II, *infra*, p. 11.

bonds, and received the controverted "interest income" as such, thereon, free from income tax. [R. 35.]

If the Commissioner wished to support his utterly strained interpretation and construction of the transaction; if he desired to have the Board *find* that the Municipal Bond Company's business was really not that of buying and selling tax-exempt bonds or interests therein, but was really that of a borrower of money for the purpose of itself making relatively long-term investments in such bonds,—he should have introduced evidence tending to prove such fact. Compare, for example, the evidence introduced by the taxpayer in *United National Corporation v. Commissioner,* 33 B. T. A. No. 119 (promulgated December 27, 1935).* Evidence of such character would have been a showing (if such proof was in fact available) that on its books of account Municipal Bond Company carried a liability for the amounts paid to it by the holders of its convertible certificates of ownership and an asset representing the tax-exempt bonds.

The Commissioner, having failed to adduce any evidence of this character, can not now be heard to complain because the Board has unanimously found that the recitals of the Municipal Bond Company were in accordance with, and not contrary to, the real transaction between it and the respondent.

The opinion of the Board adequately answers the points which respondent made based upon the language of the trust instrument, and there is, therefore, no occasion unduly to extend this brief by repeating the discussion here-

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*See, also, a recent decision of the Fourth Circuit—*Commissioner of Internal Revenue v. The H. F. Neighbors Realty Co.*—(January 14, 1936) reported C. C. H. 1936 Tax Service, Vol. 3, paragraph 9071.

in. But the attention of the court is respectfully directed to the stipulation that none of the interest income here involved flowed to respondent by reason of any of the warranties or covenants of Municipal Bond Company [R. 39].

Furthermore, even if the ultimate fact as found by the Board were without substantial support in the evidence, this would still not avail the Commissioner in this case for the reason that his petition for review contains no assignment of error to that effect [R. 67-68]. Cf. *General Utilities and Operating Co v. Helvering,* 80 Law Ed. 174.

II.

The Corollary of the Commissioner's Theory—That the Interest Received by Respondent Was Interest on Indebtedness of Municipal Bond Company—Is Demonstrably Unsound.

The Commissioner says in effect that the interest received by respondent was paid by Municipal Bond Company as interest on *its* indebtedness.

Was Municipal Bond Company indebted to respondent by virtue of the issuance of its convertible certificate of ownership? First, let us make certain as to the meaning of "indebtedness"as used in said section 234 (a) (2). "The legislature must be presumed to use words in their known and ordinary signification." *Levy's Lessee v. M'Cartee,* 6 Pet. 102, 8 L. Ed. 334, cited in *Old Colony Railroad Co. v. Commissioner,* 52 S. Ct. 211, 213.

Are the Ownership Certificates evidences of *indebtedness* of Municipal Bond Company? Is the interest received by the certificate holder "interest paid * * * within the taxable year on * * * indebtedness" of the Munic-

ipal Bond Company within the meaning of Section 234 (a) (2) of the Revenue Act of 1926 and the comparable provision of the 1928 Act—Section 23 (b)?

The term "indebtedness" is defined, in Rawle's Third Revision of Bouvier's Law Dictionary, page 1531, in the following language:

> "INDEBTEDNESS. The state of being in debt, without regard to the ability or inability of the party to pay the same. See 1 Story, Eq. Jur. 343; 2 Hill, Abr. 421.
>
> But in order to create an indebtedness there must be an actual liability at the time, either to pay then or at a future time. If, for example, a person were to enter and become surety for another, who enters into a rule of reference, he does not thereby become a debtor to the opposite party until the rendition of the judgment on award; Fales v. Thompson, 1 Mass. 134. As to indebtedness of a municipality, see MUNICIPAL CORPORATION."

Black's Law Dictionary, published by West Publishing Company, defines the term "indebtedness" in identically the same manner as the first paragraph quoted above from Bouvier's, and then adds the following paragraph:

> "The word implies an absolute or complete liability. A contingent liability, such as that of a surety before the principal has made default, does not constitute indebtedness. On the other hand, the money need not be immediately payable. Obligations yet to become due constitute indebtedness as well as those already due. 9 Mo. 149."

In *People v. Arguello,* 37 Cal. 524, the Supreme Court of California said:

> "A sum of money which is certainly and at all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, nor does it become a debt until the contingency has happened."

See, also, *In re City of San Francisco,* 191 Cal. 172 at 183.

The language of the Ownership Certificate [R. 60-63] will be scrutinized in vain for any definite and absolute promise of Municipal Bond Company to pay a sum of money, with interest thereon. The certificate provides that the holder thereof—

> "is entitled to participate *in* the proceeds and avails *of* such bonds, so deposited, to the extent of the principal sum of ..... Dollars, payable *from* such proceeds and avails on the ..... day of ...., 19...., with interest on said sum from the date hereof," etc. [R. 60.] (Italics supplied.)

The interest coupon [R. 63] provides that the Bearer "is entitled to receive ..... Dollars *from the avails* of Bonds on deposit with said Bank in Trust No. ....., according to the terms of such Trust, and the Undersigned covenants that the avails *from such bonds* will be paid." [R. 63.] (Italics supplied.)

The Municipal Bond Company covenants [R. ....] "that the principal and interest to become due *upon said bonds,*

when and as the same matures, will be paid." [R. 62.] (Italics supplied.)

These covenants obviously and clearly relate to the payment of the principal and interest of the *deposited* tax-exempt bonds. They are in the nature of a contingent guaranty and clearly do not represent a primary obligation. Until there is a default in the payment of the principal or interest by the obligors of the deposited bonds, there is no "indebtedness" of Municipal Bond Company, and, therefore, there can be no "interest" on any "obligations" of that company. The stipulation of facts affirmatively recites that during the taxable years in question none of the interest income in controversy in this case flowed to respondent by reason of any of the warranties or covenants of Municipal Bond Company [R. 39]. There was only one other source of such interest income and that was the primary source of the tax-exempt bonds themselves. Such interest was received by respondent because respondent, at the time it acquired the Ownership Certificates from Municipal Bond Company, purchased an undivided beneficial interest in the tax-exempt bonds. As the Board found [R. 34], the release and waiver of the interest in excess of 6% [R. 61] is a provision that is completely consistent with the vesting of such beneficial ownership in respondent—if Municipal Bond Company continued to be the owner of the tax-exempt bonds, there would have been no occasion for such release and waiver.

III.

Petitioner's Authorities Distinguished.

Petitioner contends (Br. p. 12) that a case quite similar to the instant one is *First National Bank in Wichita v. Commissioner,* 57 F. (2d) 7 (C. C. A. 10th).

The cases are similar only in the sense that they involved a similar question of ultimate *fact.* The evidentiary facts are utterly different. The Board of Tax Appeals was clearly right in its finding of ultimate fact, as the Circuit Court of Appeals for the 10th Circuit held in affirming the Board. In its opinion [57 F. (2d) 7] the Appellate Court said:

> "So, the issue is one of fact."

Examination of the opinion of the Board, particularly at page 749 of 19 B. T. A. 744, will show that the Board reached its conclusion in the *Wichita* case based upon oral testimony as to the *motives* of the parties, that is, First National Bank and Brown-Crummer Co. Except for such oral evidence it is clear that the taxpayer's contention would have been sustained, for the Board said:

> "We think there could be no question as to the soundness of the petitioner's contention had it taken title to these securities subject to no conditions other than is evidenced by the repurchase agreements; however, other established facts show that other considerations formed the motives of the parties to the transactions."

The instant case was submitted to the Board on a written stipulation of "agreed facts without other testi-

mony by either party." [R. 38.] This court will not attempt to weigh the evidence—the petition for review will be denied if there is any substantial evidence to support the finding of the Board. Even if the petition for review were adequate, which is not the case, this court would not reverse the Board's finding of the ultimate fact unless, as is not the case here, the "evidentiary facts"—

> "compel an opposite conclusion as a matter of law."
>
> (*Tricou v. Helvering,* 68 F. (2) 280.)

That the Board had in mind, in reaching its conclusion herein, its own decision in the case of *First National Bank in Wichita,* is shown by the citation thereof [R. 31].

To be sure, in weighing the evidence, the Board was required, under *Heryford v. Davis,* 102 U. S. 235, cited by petitioner, p. 9, to read the ownership certificates and the trust instrument together, and reach its own conclusion without regard to "the name by which the transaction may be labelled by the parties." The record shows, however, that the Board did this very thing, and *Heryford v. Davis, supra,* is cited in the Board's opinion [R. 31]. But doubtless the Board also had in mind another equally salutary rule, namely, that—

> "it is not lightly to be assumed that parties have given an erroneous name to their transactions."

(*Kentucky River Coal Corp.,* 3 B. T. A. 644; *Angelus Bldg. & Investment Co.,* 20 B. T. A. 667 at 677, affirmed by this court, *Angelus Bldg. & Investment Co. v. Commissioner,* 57 F. (2d) 133.) And see, also, *Henrietta Mills, Inc. v. Commissioner,* 52 F. (2d) 931, 934, where the Circuit Court of Appeals, 4th Circuit, citing numerous

decisions of the highest court, said that courts will not disregard the plain language of a contract or interpolate something not contained in it.

The remaining authorities cited by the Commissioner are not pertinent to any issue presented by the petition for review and, therefore, require no further comment here.

Conclusion.

It is clear that the Board's finding is one of fact and that it is amply supported by the evidence. The judgment should, therefore, be affirmed.

Respectfully submitted,

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No. 7901

United States

Circuit Court of Appeals

For the Ninth Circuit.

SALVATORE MAUGERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Co., 545 Sansome Street, San Francisco

No. 7901

United States

Circuit Court of Appeals

For the Ninth Circuit.

SALVATORE MAUGERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Co., 545 Sansome Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California.

No. 25364-L

SALVATORE MAUGERI,
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ATTORNEYS

For Plaintiff:
H. H. McPIKE,
United States Attorney,
San Francisco, California.

For Defendant:
CHARLES H. BRENNAN,
EDMUND J. DUNNING,
315 Montgomery Street,
San Francisco, California.

[Title of Court.]

FIRST COUNT: Title 18 U. S. C. A. Section 265.

In the March 1935 term of said Division of said District Court, the Grand Jurors thereof, upon their oaths, present:

THAT

GASPARE LA ROSA, SALVATORE MAUGERI AND JIMMIE PASQUA

(hereinafter called the defendants), heretofore, to-wit, on or about the 28th day of September, 1934, in the City and County of San Francisco, State of California, within said Southern Division, then and there being, did then and there unlawfully, willfully, knowingly and feloniously with intent to defraud the United States and certain persons to the Grand Jurors aforesaid unknown, keep in their possession and conceal a certain falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars as said defendants well knew, which said falsely made, forged and counterfeited Federal Reserve note is more particularly described as follows, to-wit:

"10 FEDERAL RESERVE NOTE 10
THE UNITED STATES OF AMERICA

G Redeemable in Gold on Demand
at the United States Treasury B 48291638 A
or in Gold or lawful money
at any Federal Reserve Bank 2

TEN
2 (SEAL SEAL)

(Picture of Hamilton)
Hamilton

G 96
Washington, D. C.
2 B 48291638 A Series of 1928 B

W. O. Woods
Treasurer of the
United States

A. W. Mellon
Secretary of the
Treasury

10 WILL PAY TO THE BEARER 10
ON DEMAND
TEN DOLLARS"

[1*]

Reverse:

"10 THE UNITED STATES OF AMERICA 10
TEN

(Picture of U. S. Treasury)
U. S. Treasury

10 TEN DOLLARS 10"

SECOND COUNT: Title 18 U. S. C. A. Section 263.

And the said Grand Jurors upon their oaths do further present:

*Page numbering appearing at the foot of page of original certified Transcript of Record.

That said defendants, heretofore, on or about the 28th day of September, 1934, in the City and County of San Francisco, State of California, within said Southern Division then and there being, did then and there unlawfully, willfully, knowingly and feloniously, and with intent to defraud the United States and Mrs. Freemont Simpson and other persons to the Grand Jurors unknown, pass, utter, publish and sell a certain falsely made, forged and counterfeited note purporting to be issued by a banking association doing a banking business, authorized and acting under the laws of the United States, to-wit, the Federal Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars as said defendants well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the first count of this indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein;

THIRD COUNT: Title 18, U. S. C. A., Section 265.

And the said Grand Jurors upon their oaths do further present: That said defendants heretofore, on or about the 13th day of November, 1934, in the City and County of San Francisco, State of California, within said Southern Division [2] then and there being, did then and there unlawfully, willfully, knowingly and feloniously with intent to

defraud the United States and certain persons to the Grand Jurors aforesaid unknown, keep in their possession and conceal a certain falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars, as said defendants well knew, which said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the First Count of this indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein, with the exception of difference in serial numbering of said notes; that is to say the serial number in the upper right hand corner and lower left hand corner of the obverse side of said forged and counterfeited Federal Reserve Note is B 32288534 A.

FOURTH COUNT: Title 18 U. S. C. A., Section 263.

And the said Grand Jurors upon their oaths do further present:

That said defendants heretofore, on or about the 13th day of November, 1934, in the City and County of San Francisco, State of California, within said Southern Division then and there being, did then and there unlawfully, willfully, knowingly and feloniously, and with intent to defraud the United

States and Mrs. W. F. Buchan and other persons to the Grand Jurors unknown, pass, utter, publish and sell a certain falsely made, forged and counterfeited note purporting to be issued by a banking association doing a banking business authorized and acting under the laws of the United States, to-wit, the Federal Reserve Bank of New York, New York, that [3] is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars as said defendants well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the Third Count of this indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein;

FIFTH COUNT: Title 18 U. S. C. A., Section 265.

And the said Grand Jurors upon their oaths do further present:

That said defendants heretofore, to-wit, on or about the 23rd day of November, 1934, in the City and County of San Francisco, State of California, within said Southern Division then and there being, did then and there unlawfully, willfully, knowingly and feloniously, with intent to defraud the United States and certain persons to the Grand Jurors aforesaid unknown, keep in their possession and

conceal a certain falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars as said defendants well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the First Count of this indictment, reference to which description is hereby made and made a part of this count of this indictment as though fully set forth in full herein, with the exception of difference in serial numbering of said note, that is to [4] say the serial number in the upper right hand corner and lower left hand corner of said forged and counterfeited Federal Reserve note is B 33494741 A.

SIXTH COUNT: Title 18 U. S. C. A., Section 263.

And the said Grand Jurors upon their oaths do further present:

That said defendants, heretofore on or about the 23rd day of November, 1934, in the City and County of San Francisco, State of California, within said Southern Division then and there being, did then and there unlawfully, willfully, knowingly and feloniously with intent to defraud the United States and Earl Roberts and other persons to the Grand Jurors unknown, pass, utter, publish and sell a certain falsely made, forged and counterfeited note

purporting to be issued by a banking association, doing business authorized and acting under the laws of the United States, to-wit, the Federal Reserve Bank of New York, New York, that is to say a falsely made and forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars, as said defendants well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the Fifth Count of this indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein;

SEVENTH COUNT: Title 18 U. S. C. A., Section 265.

And the said Grand Jurors upon their oaths do further present:

That said defendants, heretofore, to-wit, on or about the 30th day of November, 1934, in the City and County of San [5] Francisco, State of California, within said Southern Division, then and there being, did then and there unlawfully, willfully, knowingly and feloniously, with intent to defraud the United States and certain persons to the Grand Jurors aforesaid unknown, keep in their possession and conceal a certain falsely made, forged and counterfeited obligation and security of the

United States, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars as said defendants well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the first count of this indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein with the exception of difference in serial numbering of said note, that is to say the serial number in the upper right hand corner and lower left hand corner of the obverse side of said forged, and counterfeited Federal Reserve note is B 33494741 A.

EIGHTH COUNT: Title 18, U. S. C. A., Section 263.

And the said Grand Jurors upon their oaths aforesaid do further present:

That said defendants, heretofore, to-wit, on or about the 30th day of November, 1934, in the City and County of San Francisco, within said Southern Division then and there being, did then and there unlawfully, willfully, knowingly and feloniously, with intent to defraud the United States and William F. Byrnes and other persons to the Grand Jurors unknown, pass, utter, publish and sell a certain falsely made, forged and counterfeited note

purporting to be issued by a banking association doing a banking business, authorized and acting under the laws of the United States, to-wit, the Federal [6] Reserve Bank of New York, New York, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars, as said defendants then and there well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the Seventh Count of this indictment, reference to which description is hereby made and made a part of this count of this indictment as though fully set forth in full herein;

NINTH COUNT: Title 18, U. S. C. A., Section 265.

And the said Grand Jurors upon their oaths do further present:

That said defendants heretofore, on or about the 22nd day of December, 1934, in the City and County of San Francisco, State of California, within said Southern Division then and there being did then and there unlawfully, willfully, knowingly and feloniously, with intent to defraud the United States and certain persons to the Grand Jurors aforesaid unknown, keep in their possession and conceal a certain falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said

note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars, as said defendants well knew, and said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the First Count of this Indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein, with the exception of [7] difference in serial numbering of said notes, that is to say the serial number in the upper right hand corner and lower left hand corner of the obverse side of said forged and counterfeited Federal Reserve note is B 33494741 A.

TENTH COUNT: Title 18, U. S. C. A., Section 263.

And the said Grand Jurors upon their oaths do further present:

That said defendants heretofore, to-wit, on or about the 22nd day of December, 1934, in the City and County of San Francisco, State of California, within said Southern Division, then and there being, did then and there unlawfully, willfully, knowingly and feloniously, and with intent to defraud the United States and Clarence L. Smith and other persons to the Grand Jurors unknown, pass, utter, publish and sell a certain falsely made, forged and counterfeited note, purporting to be issued by a banking association doing a banking business, authorized and acting under the laws of the United States, to-wit, the Federal Reserve Bank of New

York, New York, that is to say a falsely made and forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars as said defendants well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the Ninth Count of this Indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein;

ELEVENTH COUNT: Title 18, U. S. C. A., Section 265.

And the said Grand Jurors upon their oaths do further present:

That said defendants heretofore, on or about the 18th day of February, 1935, in the City and County of San Francisco, [8] State of California, within said Southern Division then and there being, did then and there unlawfully, willfully, knowingly and feloniously with intent to defraud the United States and certain persons to the Grand Jurors unknown, keep in their possession and conceal a certain falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to rep-

resent a Federal Reserve note of the denomination and value of Ten Dollars as said defendants well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the First Count of this indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein, with the exception of difference in serial numbering of said notes, that is to say that the serial number in the upper right hand corner and lower left hand corner of the obverse side of said forged and counterfeited Federal Reserve note is B 32288534 A.

TWELFTH COUNT: Title 18 U. S. C. A. Section 263.

And the said Grand Jurors upon their oaths do further present:

That said defendants heretofore, to-wit, on or about the 18th day of February, 1935, in the City and County of San Francisco, State of California, within said Southern Division, then and there being, did then and there unlawfully, willfully, knowingly and feloniously, and with intent to defraud the United States and Dino Chelini and Gio Risoni, and other persons to the Grand Jurors unknown, pass, utter, publish and sell a certain falsely made, forged and counterfeited note purporting to be issued by a banking asociation, doing a banking business authorized and acting under the laws of the [9] United States, to-wit, the Federal Reserve Bank of New York, New York, that is to

say a falsely made and forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination and value of Ten Dollars as said defendants well knew, and the said falsely made, forged and counterfeited Federal Reserve note is identical with the one more particularly described in the Eleventh Count of this Indictment, reference to which description is hereby made, and made a part of this count of this indictment as though fully set forth in full herein;

THIRTEENTH COUNT: Title 18 U. S. C. A. Section 88;

And the said Grand Jurors, upon their oaths, do further present:

That said defendants, at a time and place to said Grand Jurors unknown, did knowingly, willfully, unlawfully and feloniously conspire among themselves, and with other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, to-wit, to keep in their possession and conceal, and to pass, utter, publish and sell, and attempt to pass, utter, publish and sell, with intent to defraud the United States and other persons to the Grand Jurors unknown, falsely made, forged and counterfeited notes purporting to be issued by a banking association, doing a banking business, authorized and acting under the laws of the United States, to-wit, the Federal Reserve Bank of New York, New York, that is to say cer-

tain falsely made, forged and counterfeited Federal Reserve notes of the Federal Reserve Bank of New York, New York, which said notes had theretofore been falsely made, forged and counterfeited to represent Federal Reserve notes, of the denomination and value of Ten Dollars, as said defendants well knew, and that there- [10] after, and within the Southern Division of the Northern District of California, said defendants then and there being, and during the existence of said conspiracy, one or more of said defendants, as hereinafter mentioned by name, did the following overt acts to effect the object of said conspiracy:

(1) On June 1, 1933, in the City and County of San Francisco, State of California, defendant Salvatore Maugeri purchased a 1921 Studebaker Touring car from Arthur R. Lindburg Company, 1155 Van Ness Avenue, San Francisco;

(2) On November 17, 1934, in the City and County of San Francisco, State of California, defendant Salvatore Maugeri drove an Essex Coupe automobile into the automobile repair shop of Al Logan, 3600 Geary Street, San Francisco;

(3) On November 30, 1934, in the City and County of San Francisco, State of California, defendants Salvatore Maugeri and Gaspare La Rosa met and held a conversation in front of the residence of defendant Salvatore Maugeri, located at 2161 North Point Street, San Francisco;

(4) On November 30, 1934, in the City and County of San Francisco, State of California, de-

fendant Maugeri, accompanied by defendant Gaspare La Rosa, purchased an automobile tire at the store of United Tire Company, 579 Van Ness Avenue, San Francisco;

(5) On December 6, 1934, in the City and County of San Francisco, State of California, defendants Salvatore Maugeri and Jimmie Pasqua entered the automobile repair shop of Al Logan at 4622 Geary Street, San Francisco;

(6) On December 27, 1934, in the City and County of San Francisco, State of California, defendants Salvatore Maugeri, Jimmie Pasqua and Gaspare La Rosa met at the home of defendant Salvatore Maugeri at 2161 North Point Street, San Francisco;

(7) On November 13, 1934, in the City and County of San Francisco, State of California, the defendant Gaspare La [11] Rosa passed a counterfeit Ten Dollar Federal Reserve note on Mrs. W. F. Buchan;

(8) On December 22, 1934, in the City and County of San Francisco, State of California, defendant Jimmie Pasqua passed a counterfeit Ten Dollar Federal Reserve note on Clarence L. Smith.

H. H. McPIKE,
United States Attorney.

Approved as to Form:
R. B. McM.

[Endorsed]: A true bill, C .C. Stevenson, Jr., Foreman.

Presented in open court and ordered filed Apr 23, 1935 WALTER B. MALING, Clerk By J. A. Schaertzer, Deputy Clerk. [12]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 26th day of April, in the year of our Lord one thousand nine hundred and thirty-five.

PRESENT: the Honorable WALTER C. LINDLEY, United States District Judge.

[Title of Cause.]

Now comes the U. S. Marshal and produced the defendant Salvatore Maugeri on a Bench Warrant. V. C. Hammack, Esq., Asst. U. S. Atty., was present for and on behalf of United States. No one was present as Attorney for defendant. The defendant was duly arraigned and stated his true name to be as charged in the Indictment. On motion of defendant and by consent of Mr. Hammack, it is ordered that the bail of the defendant, Salvatore Maugeri, be and the same is hereby reduced from the sum of $10,000.00 to the sum of $5,000.00. Ordered that this case be continued to April 29, 1935, to plead. Further ordered that the defendant in default of bail be remanded into custody of U. S. Marshal and that a mittimus issue herein.

[13]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 6th day of May, in the year of our Lord one thousand Nine hundred and thirty-five.

PRESENT: the Honorable WALTER C. LINDLEY, United States District Judge.

[Title of Cause.]

This case came on regularly this day for entry of plea of defendant, Gaspare La Rosa, who was present with Attorney, S. A. Abrams, Esq. Said defendant plead "Guilty" to Indictment. Ordered case contd. to May 28, 1935 for judgment.

This case also came on regularly to plead as to defendant, Salvatore Maugeri, who was present with Attorney C. H. Brennan, Esq. Said defendant plead "Not Guilty" to Indictment. Ordered case continued to May 28, 1935 for trial. [14]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 11th day of June, in the year of our Lord one thousand nine hundred and thirty-five.

PRESENT: The Honorable HAROLD LOUDERBACK, District Judge; et al.

[Title of Cause.]

This case came on for judgment as to the defendant Gaspari La Rosa and for trial as to defendants Salvatore Maugeri and Jimmie Pasqua. Wm. E. Licking and Valentine C. Hammack, Esqrs., Asst. U. S. Attys., A. N. Chelleden, Esq., Attorney for Jimmie Pasqua, and Chas. Brennan, Esq., Attorney for the defendant Salvatore Maugeri, and the said defendants were present in the custody of the U. S. Marshal. On motion of Mr. Brennan, Edward J. Dunning, Esq., was associated as Attorney for the defendant Salvatore Maugeri. The following named persons, viz:

1. A. J. Sylvester,
2. Walter A. Smith,
3. Gus Reichman,
4. Leon Shaen,
5. Frank J. O'Neill,
6. W. C. Brumfield,
7. Wm. Allen Taylor,
8. Lawrence Dimmer,
9. Chas. A. Warren,
10. Arthur Cunningham,
11. Ralph R. Strange, Jr.,
12. Thomas Angel,

were examined under oath as to their qualifications, accepted by all parties, and sworn as Jurors to try the [15] issues joined herein. The defendant Jimmie Pasqua stated his true name to be FRANK SCARPATURA. Upon motion of Mr. Hammack,

the witness Mrs. W. F. Buchan was called, failed to answer said calling. Upon further motion of Mr. Hammack, and it appearing that the U. S. Marshal has filed his Return showing service of subpoena upon said Mrs. W. F. Buchan, it is ordered that a writ of attachment, returnable forthwith, be issued for arrest of said witness. Thereafter, the U. S. Marshal produced said Mrs. W. F. Buchan upon said writ of attachment, and upon motion of Mr. Hammack, it is ordered that said Mrs. W. F. Buchan be released from custody of the U. S. Marshal and that she remain upon attendance of this Court for purpose of giving testimony until excused by the Court. Upon motion of A. N. Chelleden, Esq., ordered that all witnesses, except Mr. Philip Geauque, be excluded from the Court Room when not on the witness stand. Mr. Hammack made an opening statement to the Court and Jury, and Jewel Simpson, Chas. Vlach, Earl Roberts, Betty Byrnes, Alma Buchan, Clarence Smith, Henry Appiarius, Tony Rosini, Wm. H. Bailey, John Lytle, Ivan Barrett, Ellsworth J. Ramos, Chas H. Matlin, John G. Richwine, Burma A. Traves, Robert S. Tait and Roscoe Thompson were each sworn and examined on behalf of the United States, and the Government introduced its exhibits for identification marked Nos. A, B, C, D, E, F, G, H, I, J. After admonition of the Court to the Jury, the trial of this case was ordered continued to June 12, 1935. [16]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 12th day of June, in the year of our Lord One Thousand Nine Hundred and Thirty-Five.

PRESENT: The Honorable HAROLD LOUDERBACK, District Judge; et al.

[Title of Cause.]

The defendants, Attorneys for all parties, and the Jury heretofore impaneled being present, the trial of this case was resumed. Arche Strange, Robert B. Wells, Al. Logan, Albert Grossman, Jules A. Zimmerlin, Philip E. Geauque and Thomas B. Foster were each sworn and examined on behalf of the United States, and the Government introduced for identification its exhibits marked Nos. K and L and exhibits in evidence marked Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9; and thereupon the case was rested on behalf of United States. Mr. Brennan made a motion to strike the testimony of the Government's witnesses, and made a motion for a directed verdict as to the defendant SALVATORE MAUGERI, and A. N. Chelleden, Esq., made a motion for a directed verdict as to the defendant FRANK SCARPATURA. Mr. Licking made a motion to dismiss Counts 3, 4, 7, 8, 11 and 12, which said motion was granted [17] and the said Counts are hereby

dismissed as to each of the defendants Frank Scarpatura and Salvatore Maugeri. After argument by the parties upon the motions for directed verdict, it is ordered that the said motions be and the same are hereby denied. The defendant Salvatore Maugeri rested. Mr. Chelleden made an opening statement to the Court and Jury, on behalf of the defendant Frank Scarpatura. Isadore Costanzo was sworn as an Interpreter, Frances Scardocci was sworn and examined thru said Interpreter; and Frank Scarpatura was sworn and testified on his own behalf; and said defendant rested. In rebuttal, Archc Strange was recalled and testified on behalf of the Government, and the case was then rested on behalf of the United States. After admonition of the Court to the Jury, the trial of this case was continued to June 13, 1935. Further ordered that judgment as to the defendant La Rosa be and the same is hereby continued to June 13 1935 at 10 a. m. [18]

[Title of Court.]

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 13th day of June, in the year of our Lord one thousand nine hundred and thirty-five.

PRESENT: The Honorable HAROLD LOUDERBACK, DISTRICT JUDGE; et al.

[Title of Cause.]

The defendants, Attorneys for respective parties, and the Jury heretofore impaneled being present, the trial of this case was this day resumed. Mr. Brennan, on behalf of the defendant Salvatore Maugeri, and Mr. Chelleden, on behalf of the defendant Jimmie Pasqua, etc., each renewed motions to strike testimony and their motions for directed verdicts, which said motions were ordered denied. After argument by Attorneys for respective parties and the instructions of the Court to the Jury, the Jury retired at 4 o'clock p. m., to deliberate upon its verdict. At 9:15 p. m., the Jury returned into Court for reading of testimony of the witness Roscoe Thompson, which was read, and again retired at 9:25 p. m. At 10:20 p. m., the Jury again returned into Court and upon being asked if it had agreed upon a verdict, answered that it had and presented the Court with its [19] verdict, which was read and ordered recorded, as follows: "We, the Jury, find as to the defendants at the bar, as follows: Salvatore Maugeri, Not Guilty, Count 1; Not Guilty, Count 2; Not Guilty, Count 5; Not Guilty, Count 6; Not Guilty, Count 9; Not Guilty, Count 10; Guilty Count 13. Jimmie Pasqua, true name Frank Scarpatura, Guilty, Count 1; Guilty, Count 2; Guilty, Count 5; Guilty, Count 6; Guilty, Count 9; Guilty, Count 10; Guilty, Count 13. Gus Richman, Foreman."

The Jurors, upon being asked if said verdict was theirs, each answered that it was. Ordered

said Jurors excused until further notice. Further ordered that the U. S. Marshal furnish meals for twelve (12) Jurors and two (2) Bailiffs and/or Marshals.

The Court proceeded to judgment as to the defendant Gaspare La Rosa. Mr. Abrams, on behalf of said defendant, made a motion for probation, which said motion was ordered denied. After hearing said Attorneys, and Agent Philip E. Geauque, it is ordered that the said Gaspare La Rosa, for the offense of which he stands convicted herein, be imprisoned for the term of four (4) years upon each of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 of the Indictment and pay a fine in the sum of One ($1.00) Dollar as to each of said Counts, and that in default of payment of fine defendant be further imprisoned until said fine is paid or defendant is otherwise discharged in due course of law; and that said defendant be imprisoned for the term of two (2) years upon the 13th Count of said Indictment, said terms of imprisonment to run concurrently, such imprisonment to be in a U. S. Penitentiary to be designated by the Attorney General of the United States. Ordered that said defendant stand committed and that Commitment issue accordingly, as detailed in Judgment Book. Further ordered, upon motion of Mr. Abrams, that said defendant have a five (5) day stay of execution of [20] judgment.

The Court then proceeded to judgment as to the defendant Jimmie Pasqua, true name Scarpatura.

After hearing Mr. Chelleden and Mr. Licking, it is ordered that the said defendant JIMMIE PASQUA, TRUE NAME FRANK SCARPATURA, for the offense of which he stands convicted herein, be imprisoned for the term of seven (7) years and pay a fine in the sum of One ($1.00) Dollar upon each of Counts 1, 2, 5, 6, 9 and 10, and that in default of payment of fine defendant be further imprisoned until said fine is paid or defendant is otherwise discharged in due course of law; and that said defendant be imprisoned for the term of two (2) years upon Count 13, such imprisonment to be in a U. S. Penitentiary to be designated by the Attorney General of the United States, said terms of imprisonment to run concurrently. Upon motion of Mr. Chelleden, ordered that said defendant have a five (5) day stay of execution of judgment. Ordered that said defendant stand committed and that a Commitment issue accordingly, as detailed in judgment book.

The Court then proceeded to judgment as to the defendant Salvatore Maugeri. Mr. Brennan made a motion for arrest of judgment, which said motion was ordered denied and an exception noted. Mr. Brennan then made a motion for new trial, which said motion was ordered denied, and an exception noted. Ordered that the said defendant SALVATORE MAUGERI, for offense of which he stands convicted herein, be imprisoned for the term of two (2) years and pay a fine in the sum of Five Thousand ($5,000.00) Dollars upon the 13th Count

of Indictment, and that in default of payment of fine defendant be further imprisoned until said fine is paid or defendant is otherwise discharged in due course of law, such imprisonment to be in a U. S. Penitentiary to be designated by the Attorney General of the United States. Ordered that said defendant stand committed and that a Commitment issue accordingly, as detailed in [21] Judgment Book. Further ordered, upon motion of Mr. Brennan, that said defendant have a five (5) day stay of execution. [22]

[Title of Court and Cause.]

We, the Jury, find as to the defendants at the bar as follows:

SALVATORE MAUGERI	Not Guilty	Count 1
	Not Guilty	Count 2
	.....	~~Count 3~~
	.....	~~Count 4~~
	Not Guilty	Count 5
	Not Guilty	Count 6
	.....	~~Count 7~~
	.....	~~Count 8~~
	Not Guilty	Count 9
	Not Guilty	Count 10
	.....	~~Count 11~~
	.....	~~Count 12~~
	Guilty	Count 13

JIMMIE PASQUA, true name FRANK SCARPATURA	Guilty	Count 1
	Guilty	Count 2
	.....	~~Count 3~~
	.....	~~Count 4~~
	Guilty	Count 5
	Guilty	Count 6
	.....	~~Count 7~~
	.....	~~Count 8~~
	Guilty	Count 9
	Guilty	Count 10
	.....	~~Count 11~~
	.....	~~Count 12~~
	Guilty	Count 13

Gus Richman, Foreman [23]

[Endorsed]: Filed at 10:20 p. m. Jun. 13, 1935. Walter B. Maling, Clerk. By Harry L. Fouts, Deputy Clerk. [24]

District Court of the United States Northern District of California. Southern Division.

No. 25364-L

Conv. Viol. 18 USCA Secs. 263 & 265 18 USCA 88

THE UNITED STATES OF AMERICA

vs.

SALVATORE MAUGERI & JIMMIE PASQUA, true name FRANK SCARPATURA.

JUDGMENT ON VERDICT OF GUILTY

Wm. E. Licking and V. C. Hammack, Assistant United States Attorneys and the defendants with their counsel came into Court. The defendants were duly informed by the Court of the nature of the Indictment filed on the 23rd day of April, 1935, charging them with the crime of violating 18 USCA Secs. 263 and 265 and 18 USCA 88 of their arraignment and plea of Not Guilty; of their trial and the verdict of the Jury on the 13th day of June, 1935, to-wit:

"We, the Jury, find as to the defendants at the bar as follows:

SALVATORE MAUGERI—Not Guilty Count 1; Not Guilty Count 2; Not Guilty Count 5; Not Guilty Count 6; Not Guilty Count 9; Not Guilty Count 10; Guilty Count 13;

JIMMIE PASQUA, true name FRANK SCARPATURA—Guilty Count 1; Guilty Count 2; Guilty Count 5; Guilty Count 6; Guilty Count 9; Guilty Count 10; Guilty Count 13;

Gus Richman, Foreman"

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a Motion for New Trial and a Motion in Arrest of Judgment; thereupon the Court rendered its Judgment;

THAT, WHEREAS, the said SALVATORE MAUGERI & FRANK SCARPATURA having been duly convicted in this Court of the crime of violating 18 USCA Secs. 263 & 265 and 18 USCA 88;

IT IS THEREFORE ORDERED AND ADJUDGED that the said *FRANK SCARPATURA* be imprisoned in a United States Penitentiary to be designated by the Attorney General of the United States [25] for the period of SEVEN (7) YEARS and pay a fine in the sum of ONE ($1.00) DOLLAR as to each of Counts 1, 2, 5, 6, 9 and 10 and be imprisoned for the period of TWO (2) YEARS as to Count 13; Further ordered that in default of the payment of said fine said defendant so in default be further imprisoned in the U. S. Penitentiary until said fine be paid or until he be otherwise discharged in due course of law; Further ordered said terms of imprisonment run concurrently. Further ordered that defendant have a five day stay of execution of judgment. *SALVATORE MAUGERI* be imprisoned in a United States Penitentiary to be designated by the Attorney General of the United States for the period of TWO (2)

YEARS and pay a fine in the sum of FIVE THOUSAND ($5,000.00) DOLLARS as to Count 13; Further ordered that in default of the payment of said fine said defendant be further imprisoned in the U. S. Penitentiary until said fine be paid or until he be otherwise discharged in due course of law. Further ordered said defendant have a five day stay of execution.

Entered this 13th day of June, 1935.

WALTER B. MALING, Clerk
By C. M. Taylor, Deputy Clerk.

[Endorsed]: Entered in Vol. 29 Judg. and Decrees at Pages 603-604. [26]

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant; SALVATORE MAUGERI, 2161 North Point Street, San Francisco, California.

Name and address of Appellant's attorney: CHARLES H. BRENNAN, Esquire, Suite 821, 315 Montgomery Street, San Francisco, California.

Offense: Violation of Section 88 of Title 18 U. S. C. A. said defendant did knowingly, wilfully and unlawfully conspire among themselves and other persons to said Grand Jury unknown to commit certain offenses against the laws of the United States, to-wit: to keep in their possession and conceal, and to pass, utter, publish and sell, and attempt to pass, utter, publish and sell with intent

to defraud the United States and other persons to the Grand Jurors unknown, falsely made, forged and counterfeited notes purporting to be issued by a banking association, doing a banking business, authorized and acting under the laws of the United States, to wit, the Federal Reserve Bank of New York, New York, that is to say, certain falsely made, forged and counterfeited federal reserve notes of the Federal Reserve Bank of New York, New York, which said notes had theretofore been falsely made, forged and counterfeited to represent Federal Reserve notes of the denomination and value of Ten Dollars, as said defendants well knew, and that thereafter, and within the division and district aforesaid, said defendants during the existence of said conspiracy, did the overt acts named in the indictment to effect the objects thereof.

DATE OF JUDGMENT: June 13, 1935.

Description of Judgment or sentence: Guilty upon count Thirteen of said indictment as above set forth, two years in the Federal Penitentiary and fine of Five Thousand ($5,000.00) Dollars.

Name of Prison where now confined: County jail of the City and County of San Francisco, State of California.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

1. That the trial court erred in refusing to grant the motion to strike from the record all of

the tesimony of the witness F. Jewell Simpson called by the government upon the grounds that the testimony of said witness was incompetent, irrelevent and immaterial and hearsay as to appellant; upon the further ground that there was no conspiracy proven in said action; that said motion was made at the time said witness testified and also at the close of the government's case and at the close of all of the evidence in the case.

2. That the trial court erred in refusing to grant the same motion made at the same time as to the witness Mrs. Buchan.

3. That the trial court erred in refusing to strike from the record the testimony of the witness Charles Black for the reasons and at the time stated in reference to the witness Simpson.

4. That the trial Court erred in refusing to strike from the record the testimony of the witness Earl Roberts for the reasons and at the times as above stated as to the witness Simpson.

5. That the trial Court erred in refusing to strike from the record the testimony of the witness Mrs. Byrnes for the same reasons.

6. That the trial Court erred in refusing to strike from the records the testimony of the witness Clarence Smith for the same reasons.

7. That the trial Court erred in refusing to strike from the record the testimony of the witness Henry Apparias for the same reasons.

8. That the trial Court erred in refusing to strike from the record the testimony of the witness Rosino for the same reasons.

9. That the trial Court erred in refusing to strike from the record the testimony of the witness Wm. H. Bailey for the same reasons.

10. That the trial Court erred in refusing to strike from the record the testimony of the witness Mr. Littell for the same reasons.

11. That the trial Court erred in refusing to strike from the record the testimony of the witness Barrett for the same reasons.

12. That the trial Court erred in refusing to strike from the record the testimony of the witness Elford J. Ramos for the same reasons.

13. That the trial Court erred in refusing to strike from the record the testimony of the witness Chas. A. Matlin for the same reasons.

14. That the trial Court erred in refusing to strike from the record the testimony of the witness John G. Richwine for the same reasons.

15. That the trial Court erred in refusing to strike from the record the testimony of the witness Mr. Travers for the same reasons.

16. That the trial Court erred in refusing to strike from the record the testimony of the witness Mr. Tait for the same reasons.

17. That the trial Court erred in refusing to strike from the record the testimony of the witness Roscoe Thompson for the same reasons.

18. That the trial Court erred in refusing to strike from the record the testimony of the witness Archibald Strange for the same reasons.

19. That the trial Court erred in refusing to strike from the record the testimony of the witness Agent Wells for the same reasons.

20. That the trial Court erred in refusing to strike from the record the testimony of the witness Al Logan for the same reasons.

21. That the trial Court erred in refusing to strike from the record the testimony of the witness Al Grossman for the same reasons.

22. That the trial Court erred in refusing to strike from the record the testimony of the witness Jules A. Zimmerman for the same reasons.

23. That the trial Court erred in refusing to strike from the record the testimony of the witness Mr. Geaque for the same reasons.

24. That the trial Court erred in refusing to strike from the record the testimony of the witness Thomas B. Foster for the same reasons.

25. That the trial Court erred in failing to grant the defendant's motion for a directed verdict of "not guilty" made at the conclusion of the prosecution's case, for the reason that the evidence in said case is totally insufficient to support a verdict of "guilty" and that all of the evidence against the defendant Maugeri taken in the strongest possible construction and in favor of the government fails to prove the charge laid in the indictment and is susceptible of two constructions, one pointing to the innocence of said defendant and therefor has lost all probative value and that it was error that the trial Court allow the case against the defendant Maugeri to go to the Jury.

25. That the trial Court erred in refusing to grant the motion of the defendant Maugeri for a directed verdict made at the conclusion of all of the evidence in the case for the reason that taking all of said evidence in said case, it is insufficient as a matter of law to support a verdict of "guilty."

26. That the Court erred in not instructing the jury to return a verdict of "not guilty" upon all counts in favor of appellant. That the evidence is insufficient as a matter of law to support a verdict of "guilty", against appellant.

27. That the evidence is totally insufficient to support a verdict of the Jury as to the appellant in that it fails to show that appellant had any knowledge of any unlawful purpose whatsoever when he did any of the acts which it is alleged were done in participation of the conspiracy and that in order to be a member of an unlawful conspiracy it is necessary that both knowledge and participation be proven.

27. That the Court erred in refusing to grant the defendant's motion for arrested judgment for the reasons above stated.

SALVATORE MAUGERI,
Appellant.
CHARLES H. BRENNAN,
Attorney for Appellant.

[Endorsed]: Filed Jun. 18, 1935. Walter B. Maling, Clerk.

[Endorsed]: Filed Jun. 21, 1935. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the defendant SALVATORE MAUGERI by his attorneys, CHARLES H. BRENNAN and EDMUND J. DUNNING and in connection with his appeal herein assigns the following errors which he avers occurred in the proceedings and trial of said cause which were excepted to by him and upon which he relies to reverse the judgment entered against him.

I.

That the District Court erred in admitting the testimony of Mrs. Jewel Simpson, a witness called on behalf of the prosecution, for the reason that the same is incompetent, irrelevant and immaterial and not bind upon the defendant SALVATORE MAUGERI and hearsay as to that defendant; and the District Court further erred in denying the defendant's motion to strike the testimony of said witness from the record.

II

That the District Court erred in admitting the testimony of the witness Charles Blach, called for the prosecution, on the ground that the testimony of said witness was incompetent, irrelevant and immaterial as to the defendant MAUGERI and hearsay as to [28] him and not within the issues laid in the indictment; and further that the Dis-

trict Court erred in refusing to strike the testimony of said witness from the record as to said defendant SALVATORE MAUGERI.

III

That the District Court erred in admitting the testimony of the witness EARLE ROBERTS called on behalf of the prosecution for the same reasons and that the District Court further erred in denying the motion of said defendant SALVATORE MAUGERI to strike the testimony of said witness Roberts from the record.

IV

That the District Court erred in admitting the testimony of Mrs. Betty Byrnes, called as a witness of the prosecution, for the same reasons; and that the District Court further erred in denying the motion of said defendant MAUGERI to strike the testimony of said witness from the record.

V

That the District Court erred in admitting the testimony of Mrs. Alma Buchan, called as a witness for the prosecution, for the same reasons; and that the District Court further erred in refusing to strike the testimony of said witness from the record.

VI

That the District Court erred in admitting the testimony of the witness Clarence Smith called as

a witness on behalf of the prosecution for the same reasons; and that the District Court further erred in refusing to strike the testimony of the said witness Smith from the record as to the defendant MAUGERI.

VII

That the District Court erred in admitting the testimony of the witness Henry D. Appiarius, called as a witness of the prosecution, for the same reasons; and that the District Court further erred in refusing the defendant MAUGERI'S motion to strike [29] said testimony from the record.

VIII

That the District Court erred in admitting the testimony of the witness HENRY D. APPIARIUS as to the identification of the defendant SALVATORE MAUGERI, for the reason that said testimony was incompetent, irrelevant and immaterial and not within the issues laid in this indictment.

IX

That the District Court erred in allowing the witness HENRY D. APPIARIUS' testimony as to instructions that he received from the Secret Service Department, on the ground that the same was incompetent, irrelevant, immaterial and hearsay.

X

That the District Court erred in admitting all of the testimony of the witness HENRY D. AP-

PIARIUS; and further erred in denying the motion of the defendant MAUGERI to strike the testimony from the record.

XI

That the District Court erred in admitting the testimony of the witness TONY ROSINI as to the defendant MAUGERI and in refusing the motion of the defendant MAUGERI to strike said testimony from the record.

XII

That the District Court erred in admitting the testimony of the witness WILLIAM H. BAILEY against the defendant MAUGERI; and that the District Court further erred in refusing to strike the testimony of said WILLIAM H. BAILEY from the record.

XIII

That the District Court erred in admitting the testimony of JOHN LYTLE, called as a witness for the prosecution, against the defendant MAUGERI and that the District Court further erred in refusing to strike the testimony of said witness from the record. [30]

XIV

That the District Court erred in admitting the testimony of the witness Ivan Barrett, called as a witness for the prosecution, as against the defendant MAUGERI; and that the District Court further erred in refusing to strike the testimony of

said witness BARRETT from the record as against said defendant.

XV

That the District Court erred in admitting the testimony of ELSWORTH RAMOS, called as a witness on behalf of the prosecution as against the defendant MAUGERI; and that the District Court further erred in denying the motion of defendant MAUGERI to strike the testimony of said witness from the record as against said defendant.

XVI

The the District Court erred in admitting the testimony of the witness CHARLES H. MATLIN, called as a witness on behalf of the prosecution as to the defendant MAUGERI; and that the District Court further erred in denying the motion of the defendant MAUGERI to strike the testimony of said witness from the record.

XVII

That the District Court erred in admitting the testimony of the witness JOHN H. RICHWINE, called as a witness for the prosecution, as against the defendant MAUGERI; and that the District Court further erred in denying the motion of the defendant MAUGERI to strike the testimony of said witness from the record as to said defendant.

XVIII

That the District Court erred in admitting the testimony of BURMA A. TRAVIS, called as a

witness on behalf of the prosecution as against the defendant MAUGERI; and that the District Court further erred in refusing the motion of the defendant MAUGERI to strike the testimony of said witness from the record. [31]

XIX

That the District Court erred in admitting the testimony of the witness ROBERT S. TAIT, called as a witness on behalf of the prosecution as against the defendant MAUGERI; and that the District Court further erred in refusing to strike the testimony of said witness from the records.

XX

That the District Court erred in admitting the testimony of the witness ROSCOE THOMPSON, called as a witness on behalf of the prosecution as against the defendant MAUGERI; and that the District Court further erred in denying the motion of the defendant MAUGERI to strike the testimony of said witness from the record.

XXI

That the District Court erred in admitting the testimony of the witness ARCH A. STRANGE as against the defendant MAUGERI; and that the District Court further erred in denying the motion of the defendant MAUGERI to strike the testimony of the said witness from the record.

XXII

That the District Court erred in admitting the testimony of the defendant ROBERT B. WELLS, called as a witness on behalf of the prosecution; and that the District Court further erred in denying the motion of the defendant MAUGERI to strike the testimony of said witness from the record in said action.

XXIII

That the District Court erred in admitting the testimony of the witness AL LOGAN, called as a witness on behalf of the prosecution as against the defendant MAUGERI; and that the District Court further erred in refusing the motion of the defendant MAUGERI to strike from the record the testimony of said witness.

XXIV

That the District Court erred in admitting the testimony of the witness ALBERT GROSSMAN, called as a witness on behalf of [32] the prosecution; and that the District Court further erred in refusing the motion of the defendant to strike from the record the testimony of said witness.

XXV

That the District Court erred in admitting the testimony of the witness JULES A. ZIMMERLIN, called as a witness on behalf of the prosecution and that the District Court further erred in refusing the motion of the defendant MAUGERI to strike

the testimony of said witness from the record in said action.

XXVI

That the District Court erred in admitting the testimony of the witness PHILIP E. GEAUQUE, called as a witness on behalf of the prosecution; and that the District Court further erred in denying the motion of the defendant MAUGERI, to strike the testimony of said witness from the record in said action.

XXVII

That the District Court erred in admitting the testimony of the witness THOMAS B. FOSTER, called as a witness on behalf of the prosecution, as against the defendant MAUGERI; and that the District Court further erred in denying the motion of the defendant MAUGERI, to strike the testimony of said witness from the record.

XXVIII

That the District Court erred in admitting into evidence Government's Exhibit No. 1 in evidence as against the defendant MAUGERI.

XXIX

That the District Court erred in admitting into evidence the United States Exhibit No. 2 in evidence as against the defendant MAUGERI.

XXX

That the District Court erred in admitting into evidence [33] United States Government Exhibit

No. 3 in evidence as against the defendant MAUGERI.

XXXI

That the District Court erred in admitting Government's Exhibit No. 4 in evidence as against the defendant MAUGERI.

XXXII

That the District Court erred in admitting in evidence Government's Exhibit No. 5 in evidence as against defendant MAUGERI.

XXXIII

That the District Court erred in admitting in evidence Government's Exhibit No. 6 in evidence as against the defendant MAUGERI.

XXXIV.

That the District Court erred in admitting in evidence United States Government's exhibit No. 7 in evidence as against the defendant MAUGERI.

XXXV

That the District Court erred in admitting United States Government's exhibit No. 8 in evidence as against the defendant MAUGERI.

XXXVI

That the District Court erred in denying the motion of counsel for defendant MAUGERI to strike from the record the testimony of each and every witness produced by the Government and

each and every exhibit introduced in evidence against said defendant.

XXXVII

That the District Court erred in refusing the motion of counsel for the defendant, MAUGERI for a directed verdict of "Not Guilty" at the close of the government's case for the reason and upon the ground that from an examination of all of the Government's testimony in said case there was not sufficient evidence introduced to warrant the submission of said case to the Jury and upon the [34] further ground that the evidence adduced by the Government was as consistent with the innocence of said defendant as with his guilt and therefore totally insufficient to warrant the submission of the case to the Jury.

XXXVIII

That the District Court erred in refusing to grant said motion to strike from the record all of the testimony of each and every witness produced on behalf of the United States Government made at the conclusion of all the testimony in the trial.

XXXIX

That the District Court erred in denying the motion of the defendant MAUGERI for a directed Verdict of "Not Guilty" made at the conclusion of all of the evidence in the case for the reason and upon the ground that from an examination of all of the Government's testimony in said case

there was not sufficient evidence introduced to warrant the submission of said case to the Jury and upon the further ground that the evidence adduced by the Government was as consistent with the innocence of said defendant as with his guilt and therefore totally insufficient to warrant the submission of the case to the Jury.

XXXX

That the District Court erred in denying the motion for a new trial made on behalf of the defendant MAUGERI, for the reason and upon the ground that from an examination of all of the Government's testimony in said case there was not sufficient evidence introduced to warrant the submission of said case to the Jury and upon the further ground that the evidence adduced by the Government was as consistent with the innocence of said defendant as with his guilt and therefore totally insufficient to warrant the submission of the case to the Jury.

XXXXI

That the District Court erred in denying the motion for [35] arrested judgment made on behalf of the defendant MAUGERI, for the reason and upon the ground that from an examination of all of the Government's testimony in said case there was not sufficient evidence introduced to warrant the submission of said case to the Jury and upon the further ground that the evidence adduced by the Government was as consistent with the

innocence of said defendant as with his guilt and therefore totally insufficient to warrant the submission of the case to the Jury.

WHEREFORE the defendant prays that the judgment of said District Court against him be reversed and the said cause be remanded to the District Court with instructions to dismiss the same, and for such other and further relief as to the Court may seem proper.

CHARLES H. BRENNAN
EDMUND J. DUNNING

[Endorsed]: Service of the within Assignment of Errors by copy admitted this 16th day of July, 1935.

H. H. McPIKE,
Attorney for Plaintiff. [27]

[Endorsed]: Filed Jul. 16, 1935. Walter B. Maling, Clerk. [36]

[Title of Court and Cause.]

ORDER SETTLING
BILL OF EXCEPTIONS.

Pursuant to stipulation of Counsel, IT IS HEREBY ORDERED that that certain document of sixty pages, lodged with the Clerk of this Court on the Fifteenth day of July, 1935 entitled Bill of Exceptions, of the defendant SALVATORE MAUGERI, may be and the same is hereby considered to truthfully set forth the proceedings had upon the trial of the defendant SALVATORE MAUGERI and that it contains in narrative form all of the testimony taken upon the trial together with all of the objections made by said defendant and the rulings thereon and the exceptions noted by said defendant

and it may be and is hereby settled, allowed, certified and approved as the Bill of Exceptions in the above entitled matter;

AND IT IS FURTHER ORDERED that the Clerk of said Court file the same as a record in said case and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

DATED: July 16th, 1935.

HAROLD LOUDERBACK
Judge of the United States
District Court. [38]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be it remembered that on the Eleventh day of June, 1935 at the hour of ten o'clock, in the forenoon thereof, the above entitled case was duly called for trial before the Honorable Harold Louderback, one of the Judges of the above entitled Court. The plaintiff was represented by William E. Licking, Esquire, Assistant United States Attorney and Valentine C. Hammack, Esquire, Assistant United States Attorney; and the defendant SALVATORE MAUGERI, was represented by Charles H. Brennan, Esquire and Edmund J. Dunning, Esquire. That the defendant and his attorneys were present in Court;

And that thereupon the Court proceeded to impanel a jury to try said cause and the Jury being called came and were then and there chosen and sworn to try the issues.

That thereupon the plaintiff called as a witness one

MRS. JEWEL SIMPSON,

who testified as follows:

My name is Mrs. Jewel Simpson. I reside at 201 Steiner [39] Street. I am engaged in business. My business is a soda fountain and grocery. I was engaged in that business on September 28, 1934. I was in my place of business on that date. I had occasion on that date to receive in the course of my business a ten dollar bill. I have seen that bill again. The bill was returned the next morning by the bank. Yes, I have seen that bill that you have shown to me and it was received at the best of my recollection on that date. I placed my initials on that bill. The person who passed that bill is in the Courtroom now. He is the small man with the grey suit. I believe he wore a small mustache at the time. I am positive that he wore a little mustache. He is the man that I received the bill from.

> The record shows that the witness identified the defendant, Jimmie Pasqua, true name is given as Frank Scarpatura. The bill is received for the purpose of identification, marked Exhibit No. 1. The number appearing on that bill is B48291638A.

Thereupon the following proceedings were had:

Mr. BRENNAN: "Now, if your Honor please, I move that the testimony of this witness, as far as the defendant Maugeri is concerned, be stricken

(Testimony of Mrs. Jewel Simpson.)
from the record, upon the ground that it is immaterial, irelevant, and incompetent, and hearsay as to the defendant Maugeri."

Mr. HAMMACK: "I will say that the same will be connected up later."

The COURT: "You will make the assurance you will connect it up by other evidence with the defendant Maugeri?"

Mr. HAMMACK: "Yes, as an aider and abettor."

Mr. BRENNAN: "May I make the further objection that no conspiracy has been established."

The COURT: "Of course, I have the assurance of the United [40] States District Attorney that he will connect it up; all the evidence cannot be put on at once; it is only a matter of order of proof. I have a right to receive the proof upon the assurance of the District Attorney that he will connect it up. Of course, if he fails you are in a position then to renew your motion to strike at the conclusion of the trial. At this time I will deny the motion upon that assurance. I presume that you also give the assurance that you are going to prove the conspiracy charge."

Mr. HAMMACK: "Yes."

Mr. BRENNAN: "Of course, with perfect respect for the Court and its ruling, might I suggest that no reference has been made in the testimony of this witness whatsoever to the defendant Maugeri."

The COURT: "The point is this, the Government is trying to present its case on the first count.

(Testimony of Mrs. Jewel Simpson.)

The first count gives the number of a bill similar to the one that has been offered for identification. It is simply a matter of proof, and if the Government fails to put in sufficient evidence upon which the connection is made your motion to strike out would have to be granted, but at this time I cannot grant it, because I have to give the United States Attorney a chance to establish, if he can establish by such evidence in his hands, in the substantive counts that your client was an accessory, and in the conspiracy count he was one of the conspirators."

Mr. BRENNAN: "Might my motion run both to the indictment in its entirety, and as to counts 1 to 12 in particular, and count 13 in particular?"

The COURT: "Your request is placed in the record in the form of your objection." [41]

The Exception is noted and is assigned as

Exception No. 1.

Cross Examination

Mrs. Jewel Simpson

By A. N. Cheliden, counsel for defendant Scarpatura.

I did not know that the ten dollar bill was counterfeited. I received it early in the evening, say around 6:30 or 8:00 o'clock, around that time. There were no suspicious circumstances at the time that I received it. Not exactly. We didn't have any other Ten Dollar bills to deposit at the bank the next day. I remembered that the young man came

(Testimony of Mrs. Jewel Simpson.)
into the store and sort of hesitated and asked for a package of cigarettes. I recall that he gave me the ten dollar bill. I was very busy at the store that night. I have never seen a counterfeited bill before. I remembered him, when the bank told me that the bill was counterfeited. I can remember that man asking for a package of cigarettes. He had on a little darker suit. I could not swear that his coat was the same color as his trousers. He had a hat on. I do not remember the color of his hat. I remembered that he had a mustache.

Thereupon the prosecution called the witness

CHARLES BLACH,

and suggested that Mr. La Rosa be brought into the Court for the purpose of identification. The witness Blach thereupon testified:

My occupation is that of a service station operator. A service station operator in El Cerrito, Contra Costa County. I was employed there on the eighteenth day of November, 1934. I had a conversation with two men at my station. I see these men in the Courtroom. They are the gentlemen right over here. The fellow in the light suit, referring to the defendant Jimmy Pasqua who has given his true name as Frank Scarpatura. I conversed with them. The gentleman over here, the second one, the fellow in the brown suit. **[42]**

(Testimony of Charles Blach.)

The witness identified the defendant Gaspare La Rosa as the other man.

They were driving an Essex Coupe. I looked at the coupe at that time. I took the number of it. When they passed me the bill I got suspicious. I got suspicious, they had too much money. They had a whole pocket full of money. They took the bill out and handed it to me. It didn't look good to me, so I walked into the station and told them when I came out that I could not cash it. They paid me in silver. I took the number of the car, 3 J826. The two men in the car had a shotgun between them. I do not know what kind of a shotgun. I could see it from where I was, I could see it from where I put the gas in, when I walked around on the side. They were dressed up. I did not think they were going hunting. They were dressed up.

The witness is shown the picture of the automobile.

That is the car all right. It was in the possession of La Rosa and Pasqua at that time. There were only these two men in that car.

Photograph of the car is offered for identification. Government's Exhibit "B" for identification.

Cross Examination

Charles Blach

By A. N. Cheliden

La Rosa was driving the car. La Rosa asked for the gas. La Rosa gave me the bill. The other man did not say anything.

(Testimony of Charles Blach.)

Thereupon the following proceedings were had.

Mr. BRENNAN: "No question on behalf of the defendant Maugeri." At this time if your honor please, I renew my motion or rather make my motion with reference to the testimony of the witness Blach, who just left the stand as I did upon the occasion of [43] the witness Simpson, first on the stand. No mention having been made of the defendant Maugeri in the testimony of the last witness, and I make the motion upon the grounds that have been heretofore mentioned by me."

The COURT: "I presume that this evidence is directed to the conspiracy count?"

Mr. HAMMACK: "Yes, directed to the conspiracy and aiding and abetting, and will properly be connected up with the substantive count."

The COURT: "I will deny your motion at this time."

Mr. BRENNAN: "May we have, respectfully, an exception?"

The COURT: "I will not be able to pass upon this until such time as the United States Attorney advises me he has presented all the evidence for the purpose of connecting it up."

Exception No. 2.

Thereupon,

EARL ROBERTS

was called as a witness on behalf of the plaintiff and testifies as follows:

My name is Earl Roberts. I am in the service station business at that time. I am not doing anything now. My service station is located at 18th and Potrero Avenue. I was located there on the twenty-third day of November, 1934. I received the ten dollar bill of that date. I put my initials on that bill. I do not remember anything about the car or the person at the time that the bill was received, only that it was a BUICK Coupe.

Mr. HAMMACK: Q. How many persons were in the ESSEX coupe, if you remember?

A. There were two.

Q. Did you have occasion to take the number of the ESSEX coupe?

A. I did.

Q. Will you state what the number of that coupe was. [44]

A. I do not remember now.

Q. Did you make a note of it at that time?

A. I did.

Q. Have you that note?

A. No

Q. Did you afterwards see that coupe?

A. I did.

Q. Where?

A. In the garage across the street from the post office.

(Testimony of Earl Roberts.)

Q. Who was with you at that time?

A. Mr. Geauque.

The COURT: "That is the representative of the United States government seated behind Mr. Hammack. Is that Mr. Geauque?"

A. Yes.

Mr. HAMMACK: I will refer you to Government's Exhibit B for identification, a picture, and ask you if you can state whether or not this picture is of the ESSEX coupe which was in your station at that time and place.

A. I could not say whether it was or not.

Q. But will you say, or can you not that the Essex Coupe that came into your service station on the day you received the ten dollar bill was the Essex coupe that you subsequently saw in the garage with Mr. Geauque, is that correct?

A. I could not say.

The Bill is No. B 33494741A.

The bill appertains to the Fifth Count of the indictment.

Mr. Roberts identified the bill. I have my initials on the bill. The bill was passed to me on that occasion. I do not recall who passed it. I do not know whether or not it was passed by the man in that car or not. All I can say is that it looked like the car. The car has the same appearance. I took the license number of the ESSEX car. I do not think it had a 1935 license plate on at the time, if I recall. I made the notation on a piece of paper and

(Testimony of Earl Roberts.)

I wrote it on the bill. Those are my initials on the bill. At the time I received the bill, it was very crisp, but when I identified it, it was faded. It had gone through several tests. [45]

The COURT: "You think that has been removed in some way?"

Yes. I made my notations on one end of the bill. I made them in pencil. I do not see that at this time.

Mr. HAMMACK: No further questions.

Thereupon the following proceedings were had:

Mr. BRENNAN: "Now, if your Honor please, with reference to the defendant Maugeri, I desire to make the same motion that I previously made in the case of the previous witnesses.

The COURT: "The same ruling."

Mr. BRENNAN: "In the interest of time I will not repeat the reasons for my motion and will except to your Honor's ruling as in the case of the other witnesses.

The COURT: "Let us proceed."

Exception No. 3

Cross Examination

Earle Roberts

By Mr. Charles H. Brennan.

This is the bill I identified. I identify it by my initials. I placed the number of the machine that called at my service station that day, on the bill. I could not indicate where I placed the number,

(Testimony of Earl Roberts.)

but I am satisfied I placed the number of the machine down. I think it was a 1935 license. It had a 1935 license upon it at the time I saw it in the garage across the street. I have the impression that they were not the same license plates. There was much discussion about that bill. I kept it in my possession for several days. I was at home, sitting at the supper table and there was quite a discussion about it. Some of the folks thought it was good and some not, and there was a friend there that thought it was good and she would swear by it, so she took it down and gave it to somebody and it bounced back. I do not know who she gave it to. She did not give to the authorities. I do not remember that she gave it to the police. The office of the secret service called me up [46] and asked me to come down and see them. The next time I saw the bill it was in the office of the secret service. It did not have the number of the license plate of the machine as I had written it. I don't know whether the number was erased or not. It was not on the bill when I saw it in the possession of the Secret Service. I did not examine it at that time. The bill has not been in my possession since I saw it in the possession of the Secret Service people. The number that was on it as I wrote it is not on there now.

Mr. BRENNAN: "No further questions."

Thereupon

MRS. BETTY BYRNES

was called as a witness on behalf of the plaintiff, sworn and testified as follows:

I live at No. 260 Octavia Street. My husband is engaged in the grocery business. He sells groceries, wine and beer. I was engaged in that business on November 30, 1934. I was in the store on that date. A ten dollar bill was received by me or by Mr. Byrnes in my presence on that date. I have seen that ten dollar bill that you show me, before. My initials appear upon it. That bill was received by Mr. Byrnes. It was received in my presence. I received it from the man over there. I will walk over and point to the man.

Witness then identified the defendant La Rosa, under indictment, but not on trial, as the person passing the ten dollar bill.

The bill was marked for Identification. The number of the bill was B 33494741 A.

Mr. LICKING: "These counterfeit bills have the same number on them."

The COURT: "I am not questioning that. What count is that?"

Mr. HAMMACK: "7 and 8."

The COURT: "That will be received as Government's Exhibit D [47] for identification."

The bill is marked Exhibit D for identification.

Thereupon the following proceedings were had.

(Testimony of Mrs. Betty Byrnes.)

Mr. BRENNAN: "No questions on cross-examination, so far as the defendant Maugeri is concerned. At this time I desire to renew the motions that I previously made with reference to the testimony of the other witnesses, and I assume that there will be the same ruling."

The COURT: "I will deny the motion on the same grounds."

Mr. BRENNAN: "May the record respectfully show an exception?"

The COURT: "The record will so show."

Exception No. 4

Thereupon

MRS. ALMA BUCHAN

was called as a witness for the plaintiff and testified as follows:

My name is Alma Buchan. I am also known as Mrs. W. F. Buchan. W. F. Buchan is my husband. I am in the bakery business. My bakery is located at Lyon and Fulton. I was so employed on the thirteenth day of November, 1934. I took in a ten dollar bill of that date. The ten dollar bill that you show me was the ten dollar bill that I received. These are my initials appearing on it right there. I identify that bill by my initials. I can identify the person who gave me that bill in the courtroom.

(Testimony of Mrs. Alma Buchan.)

Mr. HAMMACK: "Might I ask that the defendant La Rosa be again brought into the courtroom?"

The COURT: "Yes. What is the number appearing on that?"

Mr. HAMMACK: "The number is B 32288534A."

That is the fellow. (Identifying the witness just brought in).

The record shows that she identified Gaspare La Rosa, who is charged as one of the defendants, La Rosa, who has pleaded guilty and is not on [48] trial at this time.

The bill is thereupon offered for identification and received as Government's exhibit E for identification.

Thereupon the following proceedings were had.

Mr. BRENNAN: No cross examination on behalf of the defendant Maugeri. Your Honor, please, I will make the same motion at this time as I made in the case of the other witnesses who have heretofore testified. I assume that it will be the same ruling.

The COURT: The same ruling.

Mr. BRENNAN: To which we take an exception, your Honor please.

Exception No. 5

Thereupon

CLARENCE SMITH

called as a witness on behalf of the plaintiff, duly sworn, examined, and testified as follows:

My name is Clarence Smith. I am a filling station employee. I was so employed the twenty-second day of December, 1934. While I was employed at that station I had occasion to accept a ten dollar bill. The bill that you show to me is the one that I accepted. Those are my initials on it. They were placed there by me. The man who gave me the bill is present in the Court. He is the man in the grey suit over there.

The witness then identified the defendant Jimmy Pasqua, who gave his true name as Frank Scarpatura. The bill marked B33494741A was then received as government's exhibit F for identification. The defendant La Rosa was brought into the Courtroom.

At the time the bill was passed, the man had somebody else in company with him. He was driving a Buick Coupe, not a coupe, but a Buick Roadster. I did not really see the man clearly who was with him, enough to be really sure. I did not pay any attention to him and would not want to say, unless I was certain. [49] I saw somebody else in that coupe.

Q. Will you state whether or not you see anyone in the courtroom who came into your station, driving an Essex coupe?

(Testimony of Clarence Smith.)

A. The man in the brown suit over there.

Mr. Smith points at Gaspare La Rosa, the defendant named in the indictment.

I had occasion to take the number of the coupe. I wrote it on the back of the cash register and gave it to Mr. Geauque. I gave the number of the coupe to Mr. Geauque. By Mr. Geauque I mean that gentleman there.

Q. Who is seated at my side?

A. Yes, that is the 1935 license.

Q. I show you Government's Exhibit B for identification and ask you to state whether or not from your recollection of that Essex coupe that is a picture of the same.

A. I believe that is it. It had a leaky gas tank.

Q. In addition to the two men whom you have identified did you at any time ever see anyone else seated in the court-room in company with the two men whom you have identified, or by himself in your gas station?

A. By "himself," I have seen the man in the brown suit back there, but not in company with them.

The COURT: "Which man in the brown suit?

A. That man."

The COURT: "The witness identifies Salvatore Maugeri, a defendant on trial."

(Testimony of Clarence Smith.)

Cross Examination

By Mr. Brennan:

My gas station is located at the corner of Mission and Valencia.

Q. You indicated the defendant Maugeri.

A. From here it looks like a brown suit. That is the man anyway.

I saw him at Mission and Valencia. I saw him any number of times. He was a regular customer. He paid me for quantities of oil and gas. I do not remember any denomination of currency that he gave me. His visits were before and after the defendant Pasqua was there in the Buick car and the defendant [50] La Rosa was there in the Essex car. When the defendant La Rosa appeared at my gas station he paid me with a ten dollar bill. The defendant Pasqua was there in a Buick car. It was the defendant in the grey suit that paid me the ten dollar bill. It was the defendant Pasqua. I reported this incident to the United States Secret Service Bureau. I was first in touch with Mr. Geauque. Mr. Geauque told me that if we got any more bills to call him immediately and tell him about it. My suspicions were not aroused at the minute, but the other man at the station knew about it, because he had been tipped off before, and when the car left, he told me about it right away. We were on the watch for ten dollar bills. Prior and subsequent to that time Mr. Maugeri was there. He never paid me with ten dollar bills.

(Testimony of Clarence Smith.)

Cross Examination

By Mr. Cheliden:

I put my initials on the ten dollar bill made when Mr. Geauque got there. I received it on the 22nd day of December. I know that because I kept a record of it. That is the way I fixed that in my mind. It was about noon or a little past, I would say 12:30 or one o'clock around there. The person that gave it to me was wearing a brown suit. I believe that he was wearing a brown hat, but I could not be positive. I have seen the man before. He was there afterwards. He was a regular customer. He was there about once a week. I could not say how often. He was a regular customer. He paid me every time he bought gas and oil. I cannot recall whether he paid in coin or currency. The only reason I know about it, is I was put wise by the other fellow, Mr. Appiarius, who worked at the station told me on the same day that I received it.

Q. What did he tell you?

A. He told me Mr. Geauque——

I took down the license number of the Essex. I do not remember it now. It is in the *in the* record. He had been a [51] customer for at least a couple of months. I cannot recall the last time I saw him. I have not been asked by the secret service to identify him any place else.

Exception No. 5A

Thereupon

HENRY D. APPIARIUS

was called as a witness on behalf of the plaintiff, duly sworn, testified as follows.

Questions by Mr. Hammack:

My occupation is a service station operator. My service station is located at 28th and Valencia. I worked with Mr. Clarence Smith. I was so employed on the 22nd day of December, 1934. I was present at the time that a ten dollar bill was passed in the station for gasoline. I was cleaning the windshield as he passed the bill to Mr. Smith. Mr. Smith called my attention to the fact that he received a ten dollar bill. I saw the bill.

Referring to Government's Exhibit "F" for identification.

Thereupon the following proceedings were had.

Mr. BRENNAN: "May it be understood that I make the objections heretofore stated on behalf of the defendant Maugeri and that it will run to all of this testimony on the ground that it is immaterial, irrelevant, and incompetent, and hearsay, not within the issues in the indictment so far as the defendant Maugeri is concerned?"

The COURT: "Overruled."

Mr. BRENNAN: "May we note an exception?"

This is the bill shown me by Mr. Smith. It was displayed at that time.

Referring to Government's Exhibit "F" for identification. [52]

(Testimony of Henry D. Appiarius.)

Mr. HAMMACK: Q. State whether or not before or shortly thereafter there was anyone in the courtroom that you have seen come into your service station, either in a party or two or three or individually?

The WITNESS: A. Yes.

Mr. BRENNAN: Objected to on behalf of the defendant Maugeri, on the ground that it is immaterial, irrelevant and incompetent, and not within the issues of the case as set forth in the indictment.

Mr. CHELIDEN: The same objection on behalf of the defendant Pasqua.

The COURT: I do not quite get the point of your inquiry.

Mr. HAMMACK: Q. At any time shortly before or after or at the time the bill was passed—this is merely for the purpose of showing association.

The COURT: I will overrule the objection.

Mr. BRENNAN: Exception.

Exception 6.

The WITNESS (continuing) There is someone in the courtroom who had been in my service station about the day this bill was received. This big fellow there. That is the fellow.

The witness indicates the defendant Salvatore Maugeri.

I did not see him on the same day. He used to come into my station. Both of them came into my

(Testimony of Henry D. Appiarius.)

station. I don't know who the other one is. The other one is the young fellow, the one with the light suit.

The witness indicates defendant Jimmie Pasqua, true name given as Frank Scarpatura.

There is someone else in the courtroom who I have seen at the service station. The one right there. I mean Mr. Geauque. There is someone else. [53]

The witness indicates the defendant Gaspare La Rosa, who is not on trial but who had pleaded guilty.

He used to come in before the bill was passed. I should say about six weeks, maybe a little longer, before. He came in about two or three times a week. All three of them never came in together. Salvatore Maugeri and Jimmie Pasqua came in together. I knew Maugeri about a month before I knew the other two defendants. They came in and told me they wanted a rate on gas, and that he had sent them in, so I gave it to them; that is why they kept coming in. The only thing that was said my Mr. Maugeri was that they were friends of his and that he would send them in and to give them a rate on their gas.

Cross Examination

By Mr. Brennan:

Mr. Maugeri has been a customer at my place. He had a restaurant not very far from there before. I served Mr. Maugeri a great number of times in my

(Testimony of Henry D. Appiarius.)

station. I have made sales to him. I obtained money from him on those occasions both before and after I received the ten dollar bill in question. I received various kinds of bills and notes of different denomination. I was under instruction from the Secret Service Department to watch for these bills. I never received a bill from Mr. Maugeri that became the subject of investigation. I have served the defendant Pasqua. I received currency from him that became the subject of investigation.

Redirect Examination

By Mr. HAMMACK: Q. Mr. Appiarius, you testified that you received instructions from the Secret Service Department. Will you state what those instructions were and under what circumstances they were given?

Mr. BRENNAN: If your Honor please, that calls for hearsay.

Mr. HAMMACK: It was brought out on cross-examination. [54]

The COURT: You opened up the filed. I will allow the question as to what instructions he received.

Mr. BRENNAN: Exception.

Exception 7

The WITNESS: He came in and told me he was a Secret Service man and wanted to look at the bill. That was after the receipt of the bill. It was before

(Testimony of Henry D. Appiarius.)

—I was confused. They came in and asked me to show them the bill which I did, and he told me, he said "Be careful". So after that I got the license numbers of the two other cars. I think it was a week before I received the ten dollar bill. It was given at the time Mr. Smith was cleaning the windshield. They spoke about a five dollar bill that he gave me. A stout fellow, Mr. Maugeri, gave it to me. He was in my station then. He was driving a Studebaker car. The other young fellow was with him. I can't think of his name now. I mean Mr. Pasqua. Immediately after I received that five dollar bill I was visited by the Secret Service Department. They were there at the same time Mr. Maugeri handed the bill to me and for that reason I was suspicious of bills.

Mr. BRENNAN: If your Honor please, I renew the motion that has heretofore been made with reference to the testimony of the last witness. The same motion having been made in the case of the other witnesses who have heretofore testified.

The COURT: The same ruling.

Mr. BRENNAN: Exception.

Exception 8.

TONY ROSINI

Thereupon Tony Rosini was called as a witness on behalf of the plaintiff and testified as follows:

(Testimony of Tony Rosini.)

I work in a restaurant. The restaurant is on Eleventh Street. I was employed there on the 18th day of February 1935. I received the ten dollar bill in the ordinary course of business. [55] I can not tell whether this is the same bill or not. That is my name on it. I don't know when they put the name on there, but it was after they took it to the bank. I did not write on there. I did not see anything written on there. I did not take the money to the bank. The boss took the money to the bank. After they brought the bill back to the place I signed my name to it. The number of the bill is 32277534-A.

The bill is marked Government's Exhibit "G" for identification.

I took the bill. I put it in the cash register. It was the only ten dollar bill in the cash register. After my shift I left and the boss came in. I just left the money in the cash register. I do not check the cash. I put it in the cash register and the boss checks cash in the morning. The boss came in and took charge and I did not see the bill any more. The boss came back and told me he got a counterfeit note back from the bank. I do not know whether it was the same. I received it from a man. I received it on the date that I stated.

Mr. HAMMACK: Q. From whom did you receive the ten dollar bill on that date?

Mr. BRENNAN: Objected to on the ground it is immaterial, irrelevant and incompetent.

(Testimony of Tony Rosini.)

The COURT: The objection is overruled.

Mr. BRENNAN: Exception.

Exception 9.

The WITNESS: I think I could identify the man who gave me the bill. I can not identify him in the courtroom. I have looked all over the courtroom and I do not see the man.

Mr. BRENNAN: No questions on behalf of the defendant Maugeri, if your Honor please, and at this time I would like to make the same motions that I have heretofore made with respect to the testimony of the witnesses who preceded this witness on the stand. [56]

The COURT: The same ruling.

Mr. BRENNAN: I respectfully note an exception.

Exception 10.

WILLIAM H. BAILEY

Thereupon William H. Bailey was called as a witness on behalf of the plaintiff and testified as follows:

By Mr. Hammack:

I am a used-car dealer. My place of business is 1250 Mission Street. I was so engaged on the 29th of September 1934, I sold the car, a picture of which you show me. It is a Hup touring car. I think the

(Testimony of William H. Bailey.)

model was 1924. I sold the car to the man sitting over there. I may be mistaken, but I do not think so.

The witness indicates the defendant Jimmie Pasqua, true name Frank Scarpatura. The picture of the Hupmobile car is marked Government's Exhibit "H" for identification.

The WITNESS: At the time I sold the car I made a record of the license. I have a copy of the record. I did not bring the actual record. The copy was made at the time. Using this copy to refresh my memory, I would state that the license of the car was 4-J-8755, 1934 license.

Cross Examination

By Mr. Cheliden:

The man who bought the car had a brown suit on. It could have been another man besides the defendant I have identified as I only saw the man once. I am not absolutely certain that this is the man. I do not know whether I would be more positive if he had a hat on. I only spoke to the man once. I was the one who really closed the deal. The man I sold the car to had a hat on.

JOHN LYTLE

Thereupon John Lytle was called as a witness for the [57] plaintiff, testified as follows:

By Mr. Hammack:

My business is service station operator. My service station is located in Vacaville. I was employed

(Testimony of John Lytle.)

there on September 30, 1934. I received a ten dollar bill for gasoline. It did not look as if it had been used at all. It was brand new and I became suspicious of it. I always do when I see a new one. I remember the car that came into the station at the time I received the bill. It was a touring car. It was a Hupmobile. There were two people in it. There is one of them over there, and this one right here, the one with the light suit.

The witness indicates the defendant Jimmie Pasqua, true name Frank Scarpatura.

Also this man over there, the man with the brown suit.

The witness indicates the defendant La Rosa.

I took the number of the car. I do not remember it right offhand. That is a picture of the car. La Rosa drove it in. I do not remember exactly which one drove it in, but I am quite sure La Rosa drove it out. That looks like the bill that I received.

The bill is marked Government's Exhibit "I" for identification. The number is B-47881481.

The man in the brown suit gave me the ten dollar bill, La Rosa.

Mr. BRENNAN: No questions, if your Honor please, on behalf of the defendant Maugeri. I now desire to make the same motions relative to the testimony of this witness as were heretofore made by me on behalf of the defendant Maugeri in the case

(Testimony of John Lytle.)

of the other witnesses who preceded this witness on the stand, your Honor.

The COURT: Same ruling.

Mr. BRENNAN: May we have an exception.

The COURT: The record will disclose Counsel's statement.

Exception 11. [58]

Cross-Examination

By Mr. Cheliden:

It looks like the bill I received. It looks like it, but I would not say for sure.

Redirect Examination

By Mr. Licking:

I don't remember whether I received more than one ten dollar bill on that date.

IVAN BARRETT

Thereupon Ivan Barrett was called as a witness on behalf of the plaintiff, and testified as follows:

By Mr. Hammack:

I am at present driving a beverage truck. I was temporarily a service station operator at a service station a mile west of Tracy on the Lincoln Highway. I was employed there on October 2, 1934. I received a ten dollar bill in payment for gasoline—

(Testimony of Ivan Barrett.)

payment for cigars, not gasoline. They handed it to me. They drove in a little before ten, in a Hupmobile touring of rather ancient model. There were two men in the car. I would say that that is a picture of the car. One of the men is in the courtroom.

The witness identified defendant Jimmie Pasqua, true name Frank Scarpatura.

The gentleman in the brown suit over there is the other gentleman.

The witness identifies the defendant La Rosa.

I put no mark on the bill but that looks like the bill. I received the bill from Mr. La Rosa.

The bill is received as Government's Exhibit "J" for Identification. The number of the bill is B-48291638-A.

Mr. BRENNAN: No questions on behalf of the defendant Maugeri. I now desire to make the same motions relative to the testimony of this witness as were heretofore made by me on behalf of the [59] defendant Maugeri in the case of the other witnesses who preceded this witness on the stand.

The COURT: The same will be denied and for the same reasons.

Mr. BRENNAN: I respectfully note an exception.

Exception No. 12.

(Testimony of Ivan Barrett.)

Cross-Examination

By Mr. Cheliden:

I received the bill between 9:30 and 10 o'clock in the evening of October 2, 1934. I remember that because the next morning Mr. Moore came down and had me fill out a blank. There is absolutely nothing on the bill that will enable me to identify it as the bill I received that night. Today was the first time that I saw Pasqua after the time that I received the bill. I saw him after I left the attorney. A gentleman took me down to the Marshal's office; I don't know who he was. I presume he was connected with the United States Government. That is my impression. That gentleman called Pasqua and said "Is that the man." That is the first time I have seen him since October 2nd.

Redirect Examination

By Mr. Hammack:

There is absolutely no doubt in my mind. I recognized him from his face.

ELSWORTH RAMOS

Thereupon Elsworth Ramos was called as a witness on behalf of the plaintiff and testified as follows:

By Mr. Hammack:

My name is Ellsworth J. Ramos. At the present time I am employed by the Loose-Wiles Biscuit

(Testimony of Elsworth Ramos.)

Company in San Francisco. On September 29, 1934 I was the manager of a beer parlor in Berkeley. It is located on the corner of Channing Way and San Pablo. While I was there employed I saw the gentleman seated over there, in the grey suit. [60]

The witness indicates the defendant Jimmie Pasqua, true name Frank Scarpatura.

I saw the other gentleman seated over there with him.

The witness indicates defendant La Rosa.

They came in the place together. I had a conversation with them. They came in and ordered two glasses of beer and my partner was helping at the bar. We were very crowded. He handed a ten dollar bill to my brother-in-law and my brother-in-law gave it to me and asked me to get some change. When I got the bill it did not feel right from the beginning. It did not feel like paper money should and I asked this gentleman where he got the money. Pasqua was the one I asked. He said that he got it from a friend of his who owns a pool room in Berkeley; and I was born and raised there and I knew everyone in business, and I knew that he was not connected with anyone in a pool room in Berkeley, and I asked him where. He said at the corner of University Avenue, and I said "This is no good, take it back and get some good money for it," and he took out a wallet and threw it down on the counter, and I should judge there was sixty or seventy

(Testimony of Elsworth Ramos.)

bills in paper money. It was all new and none of it was any good, that is, they were the same as the ten dollar bill. There were some of the twenty dollar denomination and there might have been some fives. I tried to keep the gentleman in conversation with my brother-in-law. We all huddled around the money to take a good look at it, and I tried to get out through the crowd and get to a telephone. We did not have a telephone in the place, and as I went out, I took the license number of the car. I had to go half a block to a phone. I phoned for the officers to come down. The two defendants got in the car and pulled away just as I got out. It was a Hupmobile touring car. I took the number of the car. The picture you show me is the car that they drove away in. The bill that you show me resembles the bill that was given to me by the [61] defendant Pasqua and the defendant La Rosa.

Mr. BRENNAN: No cross-examination, if your Honor please, on behalf of defendant Maugeri. I now desire to make the same motions relative to the testimony of this witness as were heretofore made by me on behalf of the defendant Maugeri in the case of the other witnesses who preceded this witness on the stand.

The COURT: The same ruling.

Mr. BRENNAN: May I respectfully note an exception.

Exception 13.

(Testimony of Elsworth Ramos.)

Cross-Examination

By Mr. Cheliden:

I did not accept that bill in payment for beer. I did not give any change. The way I first suspected it was not a genuine bill was the feeling of it. It did not have the feeling of real money; it was sort of greasy—like a counterfeit is. I have handled counterfeit bills before. Not that they were given me, but they were shown to me. I have seen them in places I have been and they all seem to have a greasy feeling. In other words, they feel like a piece of paper that laid around grease. That does not necessarily mean that it has grease on it, but it has that feeling. I have never handled valid bills that felt greasy. I would not say that if a valid bill had been in a particular place where grease could get on it it would not be greasy. I did not know that it was a counterfeit bill until I looked at it. There was a suspicious circumstance in their coming in. I never had seen them before. Their appearance was suspicious. They did not look just right. I have been in business for the last nine years and meet people all the time. I have been in the service station business and you get to know people pretty well in that line of business. You can tell by their character. You know right away what they are. The first time I saw these people I thought they were not right people. The picture on the bill was not quite [62] right. The engraving was not just right.

(Testimony of Elsworth Ramos.)

They looked suspicious. My determination was not made by the people that come in the place.

Redirect Examination

By Mr. Hammack:

As I went out to phone, I took the number and gave to the officers. A sergeant answered the phone at the police department. I do not remember the number of the car. I believe that is a picture of it. I am not certain of it. I believe that is the number.

CHARLES H. MATLIN

Thereupon Charles H. Matlin was called as a witness on behalf of the plaintiff, and testified as follows:

By Mr. Hammack:

My full name is Charles H. Matlin. I am a police officer in the City of Berkeley. I have been one for seven years. My rank is patrolman. I was in the police department on September 29, 1934. I was acting desk sergeant. It was my duty to prepare the records showing reports and complaints and broadcasting information from the station under my supervision. We have a broadcasting system in Berkeley. On September 29th or thereabouts our records show that there was a report of a certain Hupmobile touring car, with the license number, suspected of being used in the passing of counterfeit money on that date. The license number re-

(Testimony of Charles H. Matlin.)

ported was 4-J-8755. That is the license number in the picture. The car was suspected of being used in connection with the dissemination of counterfeit money. An officer was sent to the scene where the counterfeiters were supposed to have attempted to pass the bill and after complete information was secured, it was broadcast from KFW, that is the Berkeley Police Station, for all cars to be on the lookout for some men, and the description, together with the make of the car and license number and the direction the car had gone and what they were wanted for. On October 4th [63] a car came into our possession. It was found in Harmon Street just west of Adeline. There was no one in the car at the time. I could not say whether the car would run under its own power or not. The car was towed to the Shattuck Garage in Berkeley on October 4th. It had been seen in the street in the same place on October first at which time it had been tagged for parking on the street in violation of a city ordinance, but it was not until October 4th it was towed to the garage. I believe the car was turned over to the United States Secret Service. There has never been a claim for the car as far as I know.

Mr. BRENNAN: No cross-examination, if your Honor please, on behalf of the defendant Maugeri. I now desire to make the same motions relative to the testimony of this witness as were heretofore made by me on behalf of the defendant Maugeri in the case of the other witnesses who preceded this witness on the stand.

(Testimony of Charles H. Matlin.)

The COURT: The same ruling.

Mr. BRENNAN: Exception, if your Honor please.

Exception 14.

Cross-Examination

By Mr. Cheliden:

The car was found on October 4th on Harmon Street just west of Adeline. It had been there ever since October first. It was tagged in that location.

JOHN H. RICHWINE

Thereupon John H. Richwine was called as a witness for the plaintiff, and testified as follows:

By Mr. Hammack:

My business is automobile salesman. I am employed by the Arthur R. Lindburg Company. I was employed there on June 1st, 1933. I saw Salvatore Maugeri. I know Salvatore Maugeri. I had a conversation with him on that date in regard to the purchase of a car. I sold Mr. Maugeri a Studebaker Touring Car, 1921 model. I have the records of the car that was sold by me to [64] Mr. Maugeri. This is the record. Most of it is in my handwriting. It is a record of the Arthur R. Lindburg Company. Such records are made on the sale of all automobiles. The record indicates the name of the purchaser, the amount paid, the motor number and the serial number. The signature of Mr. Sam Maugeri was placed

(Testimony of John H. Richwine.)

there in my presence. Using records to refresh my recollection, the motor number was 24664, serial number 1024470.

Cross-Examination

By Mr. Brennan:

I have been employed by the Lindburg Company since it was taken over from the Chester Weaver Company some years ago. I know Mr. Maugeri. I have had other transactions with him. I remember his calling in reference to the purchase of a Studebaker 1921 model in question. I do not recognize the second slip among those papers. The only thing I recognize is this. They are the records taken from my concern and have been kept by them. It is all kept by the company. I see the name "Domenic" in blue pencil. I do not know that man. I did not see him that day. I will say he was not there. Maugeri said he was purchasing the car for someone else. I do not remember who he said he was purchasing it for.

"Q. Just to refresh your recollection Mr. Richwine, is it not true he told you he was purchasing this car for his nephew, Mr. Domenic in Santa Cruz?

"A. I believe something to that effect, yes."

I do not remember the name, but I am sure he said some relative or somebody out of town that he was purchasing the car for. Who it was I don't remember. I don't remember whether he said the relative was engaged in the flower business, or raising flowers in Santa Cruz. I do not remember any

(Testimony of John H. Richwine.)

such remark. The remark may have been made. It is too far back for me to say. My recollection as to that conversation is hazy. I cannot say that there is a current year license number indicated. There is one indicated on the slip. These records were taken from the office of the Lindburg Company. [65]

Redirect Examination

By Mr. Hammack:

I recognize the card that you show me. It is a sales tag. When we sell an automobile we mark it sold to the party, and the salesman, and the date of sale or date of delivery in this instance. The name on that is "Sam Maugeri," and the date of delivery is "6/2," signed by myself. The tag shown me had "by myself" when the car was sold.

Recross Examination

By Mr. Brennan:

The date is 6/2. That would be the second of June, 1933. That is the date of delivery, not the sales date.

BURMA A. TRAVIS

Thereupon Burma A. Travis was called on behalf of the plaintiff, and testified as follows:

By Mr. Licking:

I am in the employ of the State of California in the capacity of Assistant Chief Clerk, Division of

(Testimony of Burma A. Travis.)

Registrations, Department of Motor Vehicles. There comes under my care and supervision the keeping of records relative to the ownership of cars and the licenses issued to cars. I have the record showing the state license of a certain motor number 24664 and serial number 1024470. The number on the license issued for that car in 1934 is 3-J-826. There would be no other car in California that year using the same number.

Mr. BRENNAN: No questions. With reference to the testimony of this witness, I make the same motions, if your Honor please, for the same reasons as with the other witnesses; as to the last witness I believe I omitted to make the motion.

The COURT: The record will show your statement. The same ruling.

Mr. BRENNAN: Exception.

Exception 15. [66]

Redirect Examination

By Mr. Licking:

Our records show the name of the person registered as the owner of that car in that year and the address. The name is Jim Domenic, 155 Lighthouse Avenue.

ROBERT S. TAIT

Thereupon Robert S. Tait was called as a witness on behalf of the plaintiff and testified as follows:

By Mr. Licking:

I am in the water business. I am superintendent of the water works in Santa Cruz. It is a municipally owned water company. I have my records with me. As such superintendent the records as to subscribers or customers of my company are kept under my supervision. I have the records for 1933 and 1934. I have the records in regard to the ownership of the premises at 155 Lighthouse Avenue, Santa Cruz and the tenancy, if any, for the year 1933-1934. My record shows "S. Maugeri, owner". The tenant is "J. Domenic." There was the same owner and tenant in 1931.

Cross-Examination

By Mr. Brennan:

The record covers a period from 1931 to 1935. The word "Nash" means that is a meter.

Mr. BRENNAN: If your Honor please, so that the record shows, I make the same motion with respect to the testimony of the last witness and I would like to make the same motion with respect to the preceding witness and for the same reasons.

The COURT: Motion is denied.

Mr. BRENNAN: Exception.

Exception 16.

ROSCOE THOMPSON

Thereupon Roscoe Thompson was called as a witness on behalf of the plaintiff, and testified as follows: [67]

By Mr. Licking:

I am in business at Santa Cruz, in the garage business. I was in that business in 1934. I knew Jimmie Domenic. He lives at 155 Lighthouse Avenue. I recall an accident that Mr. Domenic suffered on the highway near Santa Cruz or Monterey. I was in Nebraska at the time. My garage business had something to do with this car after the accident. We keep books in connection with our business. The books of our company show that the car was taken out of the ocean on the same day as the accident, September 11, 1934. It was delivered to 155 Lighthouse Avenue, delivered to Domenic. I subsequently had a conversation with Domenic in reference to the car, a couple of conversations. I took possession of the car after the first conversation for the bill for taking it out of the ocean. I took it to the garage. I have a record of the motor number and serial number. The motor number is 24664 and the serial number is 1024470. I took the car about November 18, 1934. That is my best recollection. The car had no license plates on it when I took it.

Cross-Examination

By Mr. Brennan:

I do not know the distance it fell. It was a considerable distance, between forty and seventy feet.

(Testimony of Roscoe Thompson.)

Mr. Domenic was driving the car as far as I know. The car was demolished.

Mr. BRENNAN: Now, if your Honor please, at this time I wish to make the same objection and the same motions that have been heretofore made by me on behalf of the witness Maugeri, with reference to the testimony of this witness as I have to the witnesses who preceded this witness on the stand, and particularly as to the hearsay character of the testimony.

The COURT: The same ruling.

Mr. BRENNAN: May I have an exception to that, if your Honor please. [68]

The COURT: Let the record show it.

Exception 17.

Redirect Examination

By Mr. Licking:

The license plates were not on the car, and the car was demolished. The front bracket was broken in two. The two pieces of the front bracket were there. These pieces have bolt holes in them in which the brackets are set.

The COURT: We will now take an adjournment until tomorrow morning at ten o'clock.

(After the usual admonition to the Jury an adjournment was taken until Wednesday, June 12, 1935, o'clock a. m.)

(Testimony of Arch A. Strange.)

Wednesday, June 12, 1935, 10 a. m.

The COURT: The Jurors being present in the jury box, the defendants being present, and Counsel being present, we may proceed with the case on trial.

ARCH A. STRANGE

Thereupon Arch A. Strange was called as a witness on behalf of plaintiff, and testified as follows:

By Mr. Hammack:

I am in the Government service. I am an agent of the United States Secret Service.. I have been serving as such for nineteen years. My duties are investigating counterfeiting cases and all other varieties of cases pertaining to the Treasury Department. I took part in the investigation leading up to the indictment against Salvatore Maugeri, Le Rosa and Jimmie Pasqua. I had occasion to receive, on behalf of the Department of Justice, certain alleged counterfeit notes set forth in this indictment. There was a note handled by one Earl Roberts. I received the note from a Mrs. Connelly, the wife of the proprietor of the Pay-and Take-It Grocery in the Crystal Palace Market. When I received [69] the note there was something out of the ordinary on the note itself. There was a license number on the note, or what appeared to be a license number. The license number was under investigation at that time. I had just returned from a trip out of town and was not familiar with it at the time

(Testimony of Arch A. Strange.)

I picked up the bill, but since I came to the office I was informed that it had been.

The witness examines Government's Exhibit "C" for Identification.

That is the note I received at the time. The license number on the note at the time was 3-J-826. The license number was written on the right-hand side of the back of the note at the end of the Treasury Building. It was written across. Part of it is still here. It was written in ordinary pencil. It has disappeared in part. There is "3-J"—I do not know whether you can make out the "8" or not. I am referring to the dim figure after the figure "3" which appears in the right part of the reverse of the note almost immediately at the rear of the right-hand side of the representation of the building. I made a mark on the note myself, my initials and the date it was received. I did not exhibit this note to Mr. Roberts. I turned it over to Agent Wells for further investigation.

Cross Examination

By Mr. Brennan:

From the time I received this note from Mrs. Connelly in the Crystal Palace Market it was either in my possession or the possession of our office. The number was on the note when I got it. Part of it is obliterated now. The note has not been out of the custody or care of our office or of Mr. Wells or myself or the United States District Attorney since it

(Testimony of Robert B. Wells.)
came into my possession at the Crystal Palace Market, with the exception of being in the custody of the Clerk of the Court at the time of the trial. [70]

Thereupon

ROBERT B. WELLS

was called as a witness on behalf of the plaintiff, and testified as follows:

By Mr. Licking:

I am an agent of the Secret Service of the United States. I have to do with the detection of the counterfeiters and counterfeit money, among my other duties. I took part in the investigation of this case of Maugeri, Le Rosa and a person who gave his name as "Jimmie Pasqua". In the course of my investigation I had occasion to receive a certain counterfeit ten dollar note, and later exhibited to one Earl Roberts, whose home address is 871 Vermont Street this city. I received the note from Agent Strange. There was a license number on the note. As I remember, it was written in ordinary lead pencil. The license number was 3-J-826. I exhibited it to Earl Roberts. I went to the service station at Eighteenth and Potrero Avenue where he was employed and showed him the note. He identified it and initialed it. He identified it by the license number he had written on the note. It was the license number which I have referred to. Government's Exhibit "C" for Identification is the

(Testimony of Robert B. Wells.)

note in question. I identified it by my initials and by the various witnesses, in other words, the various witnesses that I had initial it in my presence. There is a remnant of a license number visible there now "3-J" and following that it is not clear on the note. That is the place where the complete license number was when I received it. I am certain that Mr. Roberts identified the note.

Cross-Examination

By Mr. Brennan:

As far as I know this note came into the possession of our office, as Mr. Strange has just related on the stand, through Mrs. Connelly at the Crystal Palace Market. From the time that the note came into our office until it was introduced here for [71] identification, that note was either in the possession of our office or employees in our office, Mr. Strange and myself, or the United States District Attorney's office. There was a number on the note when I first got it. The number is partly obliterated and the note has been in the possession of our office and the United States Attorney's office until it was introduced for identification.

Mr. BRENNAN: Now, if your Honor please, inadvertently I omitted to make my motion that I have been making relative to the testimony of witnesses who have testified in the case, concerning the testimony of the last witness Mr. Strange who was on the stand. If I may, I would like to

(Testimony of Robert B. Wells.)

make the motion that I have heretofore made with respect to the testimony of the witnesses preceding Mr. Strange, the same motion, upon the same grounds; and likewise the same motion, upon the same grounds, relative to the witness now on the stand, Mr. Wells.

The COURT: Same ruling.

Mr. BRENNAN: Exception.

Exception 18.

AL LOGAN

Thereupon Al Logan was called as a witness on behalf of the plaintiff, and testified as follows:

By Mr. Licking:

My name is Al Logan. I am in the automobile repairing business. My place of business is located at 4266 Geary Street. I have been in the repair business about seven years. I know Sam Maugeri. I had occasion to talk with him on the 17th day of November, 1934, at my old shop 3600 Geary. I saw Mr. Maugeri at that address. I had a conversation with him in regard to a car. He brought a car in and it was an Essex. He said he wanted to get it fixed up for a friend of his, that the party was going to Los Angeles, and he wanted some rings and wrist pins, [72] valves ground, adjusting brakes and tightening them. It was a Saturday and there was quite a lot of work, and I said I would try and get it out for him, and I got some help and

(Testimony of Al Logan.)

got it out for him. It was an Essex Coupe. Mr. Sam Maugeri paid the bill. There was a party with him at the time. Sam is the man on the left. "The witness identifies the defendant Salvatore Maugeri". The other man is that man in the grey suit.

The witness identifies the defendant Jimmie Pasqua, true name Frank Scarpatura.

The only thing he said was that the little fellow was going to Los Angeles on a trip and that he wanted to get the car done at that time, and we did, and about 4 or 5 days later he brought the car back and said it was not shooting right. The car was brought back to the shop by Mr. Pasqua. I imagine that it was four or five days after the first visit of Mr. Maugeri and Mr. Pasqua that the car was brought back. I tightened it up or did something to it and they got it either the next day or following day. The little fellow got the car. I saw the car again when I moved to my new address, 4622 Geary. Sam came in and said the car had burned out a bearing in the country, and I said if it was my fault I would replace the bearing. When I say "Sam" I mean Maugeri. I know him as "Sam". It was about a week or two after Pasqua took out the car that it burned out the bearing. Maugeri spoke to me alone. He said he would bring the car to my shop, which they did, and I replaced the bearing and it stayed there for about a week. Sam Maugeri brought the car to my shop. There was somebody with him. I did not pay much attention to him. He

(Testimony of Al Logan.)

brought it in the front door and I shoved it into the shop. Mr. Maugeri did not say anything about towing the car to the shop. He said he would bring it in. There was a tire that went flat, or something and I sent him across the street to put some air in it, but they could not, and they went out and picked up a used tire or something, I think they paid a dollar for it. This was the last time I saw the Essex [73] car, as I went with the tire and fixed it up. Mr. Maugeri paid for the repair work. The amount was something like thirty dollars. There was a balance of a dollar left, I think, on the account. He also paid for a connecting rod. I did not charge him for the labor, but he paid for a new connection put in there. No one else besides Maugeri paid me for any of the work done on the car. The picture that you show me

Referring to Government's Exhibit for Identification "B"

is a picture of the car that I have testified of having repaired on occasions when it was in my shop.

Mr. BRENNAN: No cross-examination. At this time I desire to make the same motion as I have heretofore made in the case of each witness who preceded this witness, and upon the same grounds, if your Honor please.

The COURT: The same ruling.

Mr. BRENNAN: Exception.

Exception No. 19.

(Testimony of Al Logan.)

Cross-Examination

By Mr. Cheliden:

Pasqua is the man I saw on that occasion. I saw him after he brought the car back the second time. Since that time this is the next time I saw him. The secret service men took me out yesterday afternoon and said "Call Pasqua out," and said "Can you identify him?" In other words, after the time I saw him on Geary Street, the second time, the truth of the matter is I saw him yesterday before I saw him today. [74]

Redirect Examination

By Mr. Hammack:

There is no doubt in my mind at the time I saw this man yesterday that he was the same man that I had previously seen in my shop on a number of occasions.

ALBERT GROSSMAN

called as a witness for the United States.

My name is Albert Grossman. I am the owner of a tire shop. It is located at 579 Van Ness Avenue. I was the owner of that business on or about November 30, 1934. I know Mr. Sam Maugeri. If you show me the sales slip, I will tell you the exact date that I saw him, that is the sales slip for my store. It is a record of the sale that was made. Using that to refresh my memory, I can say that I saw Mr.

(Testimony of Alberi Grossman.)

Maugeri in my store on November 30, 1934. I had a conversation with him. He wanted to buy a tire and had a credit memorandum which was due him, and he selected a tire and I issued the credit and he paid for the difference and went out with the tire. He was accompanied by another man. Examining this tire, I would say that it was the tire that was sold by me to Mr. Maugeri on November 30, 1934. The tire was paid for by Mr. Maugeri.

The tire is now marked United States Exhibit K for identification.

Mr. Maugeri is in the Courtroom. He is the large gentleman at the end of the table.

The record shows that the witness identified defendant Salvatore Maugeri on trial.

The sales slip on the sale of tire was then marked Government's Exhibit L for identification.

Mr. BRENNAN: No questions on cross examination. If your Honor please, on behalf of the defendant Maugeri I make the same motions that I have heretofore made on behalf of the defendant Maugeri with [75] respect to the testimony of each witness who has preceded the witness Grossman upon the witness stand upon the same grounds.

The COURT: The same ruling.

Mr. BRENNAN: We respectfully make an exception.

Exception No. 20

JULES A. ZIMMERLIN,

called for the United States.

Direct examination by Mr. Hammack.

My name is Jules Zimmerlin. I am in the bicycle business. In the month of November, 1934, I had a service station in San Mateo on 9th Avenue and Bayshore Highway. I observed an Essex coupe on or about the 28th day of November, 1934. I first noticed the car when it was going South on the Highway and past the Station. At the time I thought to myself, it would not go very far on account of the noisy motor. After a while, it came back with two men in the car. They had a blowout and they inquired whether or not I could fix the tire for them. I found that the tire could not be fixed and a new tire was too expensive for them, so they left the car in the station and came back for it two days later. This gentleman over there with the brown suit is one of the men who arrived in the Essex coupe on that date.

The records show that the witness identified the defendant Gaspare La Rosa.

and the other gentleman with the light suit.

The record shows that the witness identified defendant Jimmie Pasqua, true name Frank Scarpatura.

It remained there about two days. When he left I did not think it would get back to San Francisco. It was taken away by one of the men who I had

(Testimony of Jules A. Zimmerlin.)

seen there previously and another man whom I had not seen before. Mr. La Rosa was the man that took it away.

The witness identified Gaspare La Rosa, a defendant who had pleaded guilty, and is not now on trial.

and this man came with him in another car.

The records show that the witness identified the defendant Salvatore Maugeri. **[76]**

The picture that you show me is the car that was left at my station. "Referring to Government's Exhibit for identification 'B' and was taken away two days later."

Cross Examination

By Mr. BRENNAN: "I desire, first to make my motion based on the same grounds as heretofore made in the case of the other witnesses who preceded this witness relative to the testimony of the witness Zimmerlin, who is now upon the stand."

The COURT: "The same ruling."

Mr. BRENNAN: Exception.

Exception No. 21

Mr. Maugeri and Mr. La Rosa came in another machine. Mr. Maugeri was driving the other machine. The Essex was driven away by Mr. La Rosa.

PHILIP E. GEAUQUE

called for the United States, examined by Mr. Licking:

I am a secret service agent of the United States and part of my duties have to do with the detection of counterfeiting. I conducted the major part of the investigation leading up to the indictment in this case. I know the defendant Maugeri. I know the defendant Pasqua and I know the defendant La Rosa. They are the same ones who have been identified in this case. On November 28, James A. Mitchell and myself are watching Mr. Maugeri's home at 2161 North Point Street. Mr. Mitchel is away from the City at this time. About noon of that day we saw Mr. La Rosa and Mr. Maugeri leave from Maugeri's home in a Buick Roadster. The Roadster was license number 6 J 6704. La Rosa was driving. They proceeded to the LaSalle Cafe at 528 Green Street, where both of them entered. Shortly afterwards they came out, crossed the street and entered a Studebaker Sedan, license No. 3 H 9984. They drove to the United Tire Company at Van Ness Avenue and Golden Gate, where they entered and came out with an automobile tire. I have seen that tire again. It is Government's Exhibit K for [77] identification. They then proceeded out along Bayshore Highway to 9th Avenue and Bayshore and stopped at the Rio Grande Service Station, where was parked the Essex Coupe with a flat tire. I had never seen that Essex before. I have seen it since. Government's Exhibit B for identification is the

(Testimony of Philip E. Geauque.)

car I refer to. They arrived about two o'clock in the afternoon and the tire was taken from Maugeri's Sedan and placed on the Essex. By Maugeri's Sedan the Studebaker Sedan. Maugeri was driving it. They were around the station from the time I arrived until dusk. I do not know what they were doing. We were not close enough to see. We observed the attendant put on the tire. He had some trouble with the car, we found afterwards that he had. I do not know what they are doing. About dusk or possibly a little before dusk, La Rosa got in the Essex coupe and got some gas and started North on the Highway toward San Francisco at a speed of approximately twelve miles per hour. "Maugeri did not leave the station at that time." Maugeri remained seated at the wheel of the Sedan. After about ten minutes Maugeri left the station, caught up to the Essex and maintained the same speed as the Essex all the way up the highway to the Road where the Bayshore is connected with San Bruno, which is just about this side of the Municipal Airport. At that road the Essex turned West and Maugeri pulled to the righthand side of the Bayshore Highway, heading North and stopped. A little while later Maugeri drove over the same road as the Essex went over, and halfway between the Bayshore Highway and the Southern Pacific Railroad track he stopped and remained about five minutes. He was looking back toward the Bayshore Highway. I do not know what he was doing. "On the second

(Testimony of Philip E. Geauque.)

occasion he was looking back in the direction from which he had come." Finally he started over to the El Camino Highway and started North on the Highway and about the Tanforan Track caught up with the Essex, still going the same twelve miles an hour and continued to the new highway below the Cemetery, where he again pulled off the Highway and headed North, allowing the Essex to precede him up the new Highway. [78] He remained seated in his car for five minutes, when he continued in the same direction the Essex had taken. That is the highway behind Daly City and Colma. He continued over the Boulevard to, I believe 19th Avenue, where they stopped and as I passed them I observed them talking to each other. I was alone by that time, Mitchell had left me and I was driving our car and there was a lot of traffic and I lost track of the Studebaker and Essex. I didn't see either the defendant or the cars that day. In the course of my investigation I saw the defendant and the cars again many times. I never saw La Rosa again until April. The first defendant that I saw after the occasion when Maugeri took La Rosa to San Mateo was Maugeri. I saw him at various times with Pasqua, both on foot and in either one or the other of the automobiles. One belonged to Maugeri, the sedan, or the roadster that belonged to Pasqua. On December 8th, if I am not mistaken, I may be wrong about the date, we were again watching Maugeri, trying to locate La Rosa. On this occasion,

(Testimony of Philip E. Geauque.)

Maugeri and Pasqua left the LaSalle Restaurant this time in Pasqua's roadster, "The same Buick that they had started out in on the 28th of November" Agent Strange was with me on this occasion and we followed them on that date, Pasqua driving to Al Logan's repair shop on 10th Avenue and Geary, where we saw, in the back of the shop, the same Essex coupe that I had lost sight of in Golden Gate Park in November, I believe and license No. was 6J8302, but I am not sure of that. It was the 1934 license. When I next observed it, the same license plates were on it. They had a blowout. The tire blew out just as they were backing out. They got another car and finally left Logan's repair shop, Pasqua driving the Essex and Maugeri driving the Buick. Maugeri was preceding the Essex on the way downtown. At Bush and Larkin Street they had another blowout and Maugeri did not know that the Essex had a flat tire and went on and lost sight of Pasqua. Pasqua took the Essex to the Safety Company and secured a new tire, I mean a used tire and by this time it was [79] dark. It was around five, five fifteen or five thirty and he and proceeded East on Bush to Bush and Kearny where I lost them again on account of traffic congestion. I believe that not every day, but on a good many days from that time on we watched Maugeri and Pasqua until Pasqua disappeared. On the night of December 27 at eleven o'clock at night, I was covering Maugeri's house and I saw Pasqua and La Rosa

(Testimony of Philip E. Geauque.)

come out of the house and run across the street and get in Pasqua Buick roadster. I followed them to 333 Holly Park Circle in the Mission and La Rosa alighted and entered one of the houses there. Pasqua continued to 22nd and Alabama Street where he put his Buick in a garage. I dropped him then and from that time on I tried to locate La Rosa, but could not find him. In the meantime Pasqua disappeared. On March 15 we arrested Maugeri along with several other men. An April 8th, I located and arrested La Rosa riding in that Essex automobile. At that time it had on a new 1935 plate. I have heard that the license plate No. 3J 826 was originally issued to a roadster in the name of Domenic. That was not the license number on the Essex when I saw it in San Mateo. The 1934 license that was on the car was issued to a man by the name of Larkin. Those were the plates that were on it when I first saw it. The tire that I have identified was the one which I saw Maugeri take to San Mateo. At the time La Rosa was arrested this time was on the right rear of the Essex. I caused it to be taken off.

Mr. LICKING: That is all.

Mr. BRENNAN: I have no questions, if your Honor please, on behalf of the defendant Maugeri, but at this time, with reference to the testimony of the witness Geauque now upon the stand I make the same motion in defendant Maugeri's behalf as has been previously made to the testimony of each wit-

(Testimony of Philip E. Geauque.)

ness who preceded the witness Geauque on the stand, and upon the same grounds.

The COURT: The same ruling.

Mr. BRENNAN: Exception.

Exception No. 22. [80]

THOMAS B. FOSTER

Thereupon Thomas B. Foster was called as a witness for the plaintiff, and testified as follows:

By Mr. Licking:

I am in the Secret Service of the United States Government. I am in charge of the operations of that branch of the Government in this district. My district covers the northern judicial district of California, half of the judicial district of Nevada, and all of the judicial district of Hawaii. On June 15 I will have been in charge of that branch of the service fourteen years. I have been in the service 34 years. During all that period of time I have had occasion to deal with the matter of detection of counterfeit currency and counterfeit coin.

The witness was then shown Government's Exhibits A, C, D, E, F, I, and J for identification.

Exhibit A for identification is a counterfeit $10 note on the Federal Reserve Bank of New York, having the check letter G, face plate 1896. Exhibit C for identification is likewise a counterfeit $10 note

(Testimony of Thomas B. Foster.)

on the Federal Reserve Bank of New York, having the check letter G and face plate of 1896. Exhibit D for identification is likewise a $10 counterfeit bill on the Federal Reserve Bank of New York, with the check letter G and the face plate of 1896. Exhibit E for identification is likewise a counterfeit $10 note on the Federal Reserve Bank of New York, with the check letter G and face plate of 1896. Exhibit F for identification is likewise a counterfeit $10 bill on the Federal Reserve Bank of New York, with the check letter G and face plate of 1896. Exhibit I for identification is also a counterfeit $10 bill on the Federal Reserve Bank of New York, with the check letter G, and face plate of 1896. Exhibit J for identification is likewise a counterfeit $10 bill on the Federal Reserve Bank of New York, having the check letter G and the face plate of 1896. [81] In my opinion all of these notes are from the same source. By that I mean they are from the same plates. I know these are counterfeit because they do not have the distributed silk fibre in the paper, which is always found in genuine currency; the portraits are not nearly so sharp or well defined; the printing is not nearly so good as on the genuine. They are, however, deceptive counterfeits. These defects are common to all the particular bills.

Mr. LICKING: I have no further questions.

Mr. BRENNAN: No questions on behalf of the defendant Maugeri, but at this time I want to make the same motion relative to the testimony of this witness, Captain Foster, as has heretofore been

(Testimony of Thomas B. Foster.)
made on behalf of the defendant Maugeri relative to the testimony of each witness who has preceded this witness upon the stand, and upon the same grounds.

The COURT: The same ruling.

Mr. BRENNAN: Exception.

Exception No. 23

Mr. LICKING: We now offer in evidence as to all of the defendants Government Exhibit A for identification.

The COURT: It will be received as Government's Exhibit No. 1.

Mr. BRENNAN: Objected to on the ground, in so far as the defendant Maugeri is concerned, it is immaterial, irrelevant, and incompetent, not binding upon the defendant Meugeri, not within the issues of this case so far as the defendant Maugeri is concerned.

Mr. CHELIDEN: I will interpose the same objection on behalf of the defendant Pasqua.

The COURT: The objection will be overruled.

Mr. BRENNAN: Exception.

Mr. CHELIDEN: Exception.

The note marked U. S. Exhibit A for identification was [82] received and marked in evidence as "U. S. Exhibit 1."

Exception No. 24.

(Testimony of Thomas B. Foster.)

Mr. LICKING: I now offer in evidence Exhibit B for identification.

Mr. BRENNAN: The same objection, if your Honor please, and upon the same grounds, if your Honor please.

Mr. CHELIDEN: The same objection.

The COURT: The objection will be overruled and it will be received as Government's Exhibit No. 2 in evidence.

Mr. BRENNAN: Exception.

Mr. CHELIDEN: Exception.

The photograph marked U. S. Exhibit B for identification was received and marked in evidence as U. S. Exhibit 2.

Exception No. 25

Mr. LICKING: I now offer in evidence Government's Exhibit C for identification.

Mr. BRENNAN: The same objection upon the same grounds, as to the defendant Maugeri.

Mr. CHELIDEN: The same objection.

The COURT: The objection will be overruled and it will be received as Government's Exhibit 3.

Mr. BRENNAN: Exception.

Mr. CHELIDEN: Exception.

The note marked U. S. Exhibit C for identification was received and marked in evidence as U. S. Exhibit 3.

Exception No. 26

(Testimony of Thomas B. Foster.)

Mr. LICKING: I now offer in evidence Government's Exhibit D for identification.

Mr. BRENNAN: The same objection, based upon the same grounds as to the defendant Maugeri.

Mr. CHELIDEN: The same objection as to the defendant Pasqua, your Honor.

The COURT: I will take that under advisement as to defendant D for identification. [83]

Mr. LICKING: I now offer in evidence Government's Exhibit E for identification.

Mr. BRENNAN: The same objection, upon the same grounds, on behalf of the defendant Maugeri.

Mr. CHELIDEN: The same objection.

The COURT: I will take that under advisement.

Mr. LICKING: I will now offer in evidence Government's Exhibit F for identification.

Mr. BRENNAN: The same objection, if your Honor please, based upon the same grounds, on behalf of the defendant Maugeri.

Mr. CHELIDEN: The same objection on behalf of the defendant Pasqua.

The COURT: The objection will be overruled and it will be received as Government's Exhibit 4 in evidence.

Mr. BRENNAN: Exception.

Mr. CHELIDEN: Exception.

The note marked "U. S. Exhibit F for identification" was received and marked in evidence as "U. S. Exhibit 4."

Exception No. 27

(Testimony of Thomas B. Foster.)

Mr. LICKING: I now offer in evidence Government's Exhibit H for identification.

Mr. BRENNAN: The same objection on behalf of the defendant Maugeri, based upon the same grounds, if your Honor please.

Mr. CHELIDEN: The same objection on behalf of the defendant Pasqua.

The COURT: The objections are overruled and it will be received as Government's Exhibit No. 5 in evidence.

Mr. BRENNAN: Exception.

Mr. CHELIDEN: Exception.

The photograph marked U. S. Exhibit H for identification was received and marked in evidence as "U. S. Exhibit 5."

Exception No. 28. [84]

Mr. LICKING: I now offer in evidence Government's Exhibit I for identification.

Mr. BRENNAN: The same objection on behalf of the defendant Maugeri, if your Honor please, based upon the same grounds.

Mr. CHELIDEN: The same objection on behalf of the defendant Pasqua, if your Honor please.

The COURT: The objection will be overruled and it will be received as Government's Exhibit No. 6 in evidence.

Mr. BRENNAN: Exception.

(Testimony of Thomas B. Foster.)

Mr. CHELIDEN: Exception.

The note marked U. S. Exhibit I for identification was received and marked in evidence as "U. S. Exhibit 6."

Exception No. 29

Mr. LICKING: I now offer in evidence Government's Exhibit J for identification.

Mr. BRENNAN: The same objection, if your Honor please, on behalf of the defendant Maugeri, based upon the same grounds.

Mr. CHELIDEN: The same objection on behalf of the defendant Pasqua, if your Honor please.

The COURT: The objection will be overruled and it will be received as Government's Exhibit No. 7 in evidence.

Mr. BRENNAN: Exception.

Mr. CHELIDEN: Exception.

The note marked U. S. Exhibit J for identification was received and marked in evidence as U. S. Exhibit 7.

Exception No. 30

Mr. LICKING: I now offer in evidence Government's Exhibit K for identification.

Mr. BRENNAN: The same objection on behalf of the defendant Maugeri, based upon the same grounds, your Honor.

Mr. CHELIDEN: The same objection on behalf of the defendant Pasqua. [85]

(Testimony of Thomas B. Foster.)

The COURT: Objection overruled, and it will be received as Government's Exhibit No. 8 in evidence.

Mr. BRENNAN: Exception.

Mr. CHELIDEN: Exception.

The tire marked U. S. Exhibit K for identification was received and marked in evidence as U. S. Exhibit 8.

Exception No. 31

Mr. LICKING: I now offer in evidence Government's Exhibit L for identification.

Mr. BRENNAN: The same objection, if your Honor please, on behalf of the defendant Maugeri, based upon the same grounds.

Mr. CHELIDEN: The same objection on behalf of the defendant Pasqua.

The COURT: It seems to me that is not anything that should go in evidence.

Mr. LICKING: It is really a sales slip and is really corroborative of the testimony, but it is not essential to the Government's case.

The COURT: I do not think it should be introduced in evidence. The testimony is in on it.

Mr. LICKING: Very well. There are certain matters your Honor has taken under advisement.

The COURT: As to Government's Exhibits D and E for identification.

Mr. LICKING: Does the Court wish me to make a resume of the testimony as to them?

(Testimony of Thomas B. Foster.)

The COURT: I think it should be submitted to the Court.

Mr. LICKING: I have prepared a resume of the evidence.

The COURT: If you will submit it to me I may be able to get in touch with the shorthand reporter at noon and satisfy myself as to those two.

Mr. LICKING: I will take the matter up with the Reporter and call his attention to the part of the testimony on which the Government [86] relies.

The COURT: Have you any further testimony which you are going to offer?

Mr. LICKING: The Government has no further evidence in the case, that is, it is the Government's intention to close at this time. The Government rests, your Honor.

The COURT: I will rule on those exhibits later, so that in making any motion it will be taken into consideration that it is made with the idea that the Court might or might not grant the offer as to Government's Exhibit D and E for identification, and you may go ahead.

Mr. BRENNAN: Now, may it please your Honor, at this time on behalf of the defendant Maugeri I desire to move that the testimony of each and every witness offered by the Government be stricken from the record upon the ground that the testimony of each witness in its entirety, so far as the defendant Maugeri is concerned, is immaterial, irrelevant, and incompetent, and hearsay,

(Testimony of Thomas B. Foster.)

and not within the issues presented by the indictment in this case, and I desire to make that motion as to each one of the thirteen counts in the indictment. And I desire at this time, if your Honor please, to make a motion in behalf of the defendant Maugeri for a directed verdict upon all the statutory grounds and upon the ground of the insufficiency of the evidence as against the defendant and Maugeri, and upon the further ground of the insufficiency of the charge in the indictment, and the insufficiency of the proof to meet the charges that have been set forth in the indictment as against the defendant Maugeri. I would like an opportunity to address the Court upon the motions that I have made, and I would ask that the jury be excused while I am presenting my argument on the law upon which I base my motions that I have indicated to your Honor.

The COURT: Any further motions on the part of the other defendant? [87]

Mr. CHELIDEN: For the purpose of keeping the record straight, on behalf of the defendant Pasqua I desire to make a motion for a directed verdict on the grounds Mr. Brennan has specified and the insufficiency of the evidence. I will submit that matter to your Honor without further argument.

The COURT: We will take a recess until two o'clock.

(With the usual admonition of the jury a recess was taken until two o'clock p. m.)

(Testimony of Thomas B. Foster.)

AFTERNOON SESSION.

The COURT: In respect to Exhibits D and E for identification the motion to have them placed in evidence will be denied.

Mr. LICKING: At this time, then, I move the dismissal of counts 3 and 4 and counts 7 and 8 and counts 11 and 12 as to all defendants.

The COURT: That will be granted. Let the jury be brought in.

(Thereupon the jury was brought in.)

The jurors being present in the jury box, the defendants being present, and counsel on both sides being present, I might advise the jury before proceeding to pass upon the motions which were presented to the Court before the jury was excused that since the absence of the jury that six of the counts have been dismissed on motion of the United States Attorney, in other words counts 3 and 4, 7 and 8, and 11 and 12, leaving now seven counts for consideration by the jury. The motions for a directed verdict on those counts which remain before the jury are denied. Let us proceed with the presentation of the case.

Mr. BRENNAN: May we note an exception at this time? The defendant Maugeri rests, if your Honor please.

Exception No. 32

Mr. CHELIDEN: Might I at this time make an opening statement?

(Testimony of Thomas B. Foster.)

The COURT: You may proceed.

(Thereupon Mr. Cheliden made a statement on behalf of defendant Pasqua.) [88]

FRANK SCARPATURA

Thereupon Frank Scarpatura was called as a witness on behalf of the defendants, and testified as follows:

By Mr. Cheliden:

My name is Frank Scarpatura. I am charged in this indictment as Jimmie Pasqua. I have used that name. It is a fictitious name. I used it because I was in business before and I lost the business, and I did not want my friends to know. I used it because I failed in business, and I did not want my friends and family to know that I was a failure in business. I was a "flop" in business. I remember the testimony of Mrs. Simpson to the effect that I passed a counterfeit $10 bill on her. I did not pass a counterfeit note on her on September 28, 1934. I know that because I was sick on that date. I was sick on the 27th, 28th, 29th, 30th of September, and the 1st and 2nd of October. I was sick about 7 days, something like that. I had a fever and a bad cough. Mrs. Scardocci, at 2862 22nd Street, the landlady where I lived at that time took care of me. My sickness fixes the date in my mind. I was with nobody on the 2nd

(Testimony of Frank Scarpatura.)

day of October, that is the day my father died and I always stayed home. I always stayed at home on the anniversary of my father's death and on the anniversary of my mother's death. The date of my mother's anniversary is November 12th. I was not at El Cerrito on November 13. I have never been in El Cerrito. I don't know where Vacaville is. I was not with La Rosa in El Cerrito on November 13, 1934. I fix November 13 because I went to Santa Cruz to pick some mushrooms with a friend of mine in Santa Cruz, and the 14th was a birthday, so he told me to stay there, and I stayed there on the 13th and 14th. I went down on the 13th of November to pick some mushrooms with my friend, and he asked me to stay for his birthday on the 14th. On the 13th and 14th of November I was in Santa Cruz. I remember that I bought gasoline at a service station at Mission and Valencia [89] Streets, on December 22, 1934. I remember that because I had a check from Sacramento from a friend of mine, John Pelini, who has a grocery store. The check was for $32. I gave it to Mrs. Scardocci because I had no money in the bank, had no bank account. She cashed it and brought me three $10 bills and $2, and I gave her one $10. bill. I kept two $10 bills and $2, and then I bought some gasoline. I bought gasoline on that date because I was figuring to go out with my girl to get a ride, or something like that. I gave that service station a $10 bill that day in payment of

(Testimony of Frank Scarpatura.)

gas. I gave the $10 because the $2 was not enough. I took ten gallons of gas and a quart of oil. I did not know that that $10 bill was counterfeit when I handed it to the service station man. I never saw a counterfeit bill in my life. I had been buying gas at that service station regularly. I have never been in the company of La Rosa when he passed a $10 bill. My acquaintance with La Rosa is that he was a barber and I used to go to his shop and get a shave and a haircut. I never owned a Hupmobile car.

Cross-Examination

By Mr. Licking:

I used the name Pasqua for four years, four and a half years. I was in business in White Plains, New York. I used the name Frank Scarpatura, my right name. I was using my right name when I failed there. I used this name Pasqua so that my people would not know I failed. My father and mother are dead, I have a cousin in New Rochelle. New York. The only people I now have alive live in New York. I have a cousin in New York, and three or four cousins in New Rochelle, New York, and I have some in Brooklyn. All of my friends and acquaintances live in New York. My business was in New York four years ago and I used this name of Scarpatura. I failed in that business. I was using that name at the time I failed. And thereafter I used the name of Pasqua so that my [90] friends would not know that I had been in that business. That was the only reason I had for using that name. That was the first fictitious

(Testimony of Frank Scarpatura.)

name I have ever used. I am sure I never used any other name except my own name of Scarpatura, Frank Scarpatura, and Jimmie Pasqua, and Tony Pasqua. Sometimes they put on the driver's license Tony Pasqua. When I was getting a driver's license they asked my name, and I told them Jimmie Pasqua, and they wrote the name Pasqua Jimmie. When my attorney questioned me, I said that I used that name so that the people back in New York would not know that I failed in business. When I went to get a license, I gave the name Jimmie Pasqua and they put it down Pasqua Jimmie, and then I got ahead and write the same name. I did not have a doctor at the time I was sick with fever. I was sick in bed with it about five or six or seven days, something like that. I never called in any doctor. I was working for about sixteen months in the Central Market at 23rd and Bryant. From October, 1934, up to now, I had no work The last place I worked I was picking fruit in the country, last August. It was a few months after I came from back East that I started to work at this market, and I was there about sixteen months. I failed in business in White Plains in 1930. Then I came out here. It was after I came out here that I took the name of Pasqua Jimmie in order that my people back East would not know I had failed in business there. At the time I failed in business I was using my right name, Frank Scarpatura. I

(Testimony of Frank Scarpatura.)

went to work at the Central Market, in San Francisco. I worked there about sixteen months, around 1932, I think. Then I worked in the country where I could pick fruit, down at San Jose, Santa Cruz, all over the country, I have been all around. I worked at picking fruit. I picked fruit in the summer time. After that I picked grapes. I worked all over the country. I picked grapes. I was in Sacramento once in a while. I never done work up there. I went to see a friend of mine, and tried to find something up [91] there, but could not. I never did anything around Sacramento. I was not doing anything at all during this period of time that these people think I passed these bills on them. The money I had I got for working about 16 months over in the market and then in the summer time in the fruit. It was back in 1932 that I worked in the market. I am a pretty economical fellow. I saved my money pretty well. I have been making money in the summer time, and once in a while I used to go early in the morning to the market and help take something out of the truck, and maybe make a dollar or two, enough to make my living. I had an automobile, a Buick. There is a loan on it. I never had a Hupmobile. I never used to ride around with Gaspare La Rosa. I did not buy this Essex. I never had anything to do with it. I went once down to San Mateo, on the Bayshore Highway to get it with Sam Maugeri and take it to the ferry. That was the only thing I had to do with it. I don't know whose it was. I don't know if it be-

(Testimony of Frank Scarpatura.)

longed to another fellow who was from Los Angeles, maybe it was his. He was a little short fellow that looks like me only with a moustache. I only brought that to the garage and then after that I brought it to the Ferry. I did not go down with Sam to the Ferry. When I went down to San Mateo Sam drove my car and I drove the other car. Sam got me to drive it down to the Ferry after it was fixed up. I gave it to this little fellow and I came home. I saw it in Mr. Logan's garage. I am not sure that I was in there with Maugeri at that time. When Mr. Logan testified that I came in with Maugeri the first time it was fixed, he was mistaken. I brought the car from San Mateo and I took it to the Ferry, that is all I know. If they say I passed counterfeit money, I know nothing about it. I went East, I put a loan on my car, got $135, and went back because I lived there. I went back because I had nothing to do, I had only this work in the summer time. I started back East February 3. I had not heard anything at the time about this Essex car that I [92] had been driving being looked for by the police. I had never heard anything about Gaspare La Rose being looked for by the police. Gaspare La Rosa is a barber. All I ever had to do with him was going in and getting a haircut once in a while, and a shave. I was once with La Rosa going hunting, on a Sunday morning, we got up early, and he asked me to go out in the car with him hunting, it was on a Sunday morn-

(Testimony of Frank Scarpatura.)

ing, I think it was in November, and we went down by San Mateo, we went through there, and we had a shotgun, and we could not kill nothing, just killed three robins, and then we came back about twelve o'clock and I went home. We went in my own car, the Buick. I never did ride around with him in the Essex. The only thing I had to do with the Essex was once when Maugeri asked me to bring it up from San Mateo for him, and another time when he asked me to take it down to the Ferry. I live at 2862 22nd Street, San Francisco. I have lived there for about two years. I think I had the Buick about two years, maybe more, I don't remember. I lived at 1086 Van Ness South, when I got the Buick. I used the name Tony Pasqua Jimmie. Sometimes I write that, and like that. Those are the two ways that I signed my name. I signed my name that way when I bought the car. Maybe the salesman write my name Pasqua Jimmie, and I write it that way. Maybe I didn't sign it that way. The salesman put the name that way and I have to sign it that way. I signed maybe Tony Pasqua Jimmie, or Jimmie Pasqua; maybe they put Tony Pasqua Jimmie in the paper and I have to sign it that way. That is my signature at the bottom of this. I did not sign that. I don't know if someone signed it for me. It looks like I signed it. That is my customary signature that I have written on this piece of paper. Only Pasqua Jimmie is on my driver's license. I think the Buick cost me $644. I

(Testimony of Frank Scarpatura.)

paid around $37 a month. I have not had any work since 1932 except what work I could get picking fruit. I was not doing anything at the time that I am accused [93] of passing bills. I have been working in the country. The last man I worked for was a man in Santa Cruz. I don't know his name. You go through there and ask for a job of picking fruit and they give it to you, they say "All right," and you work for a couple of months and that is all. I don't remember the name of the man I worked for last.

MRS. FRANCES SCARDOCCI

Thereupon Mrs. Frances Scardocci was called as a witness on behalf of the defendants, sworn, and testified through Interpreter Isadore Costanzo, as Interpreter.

By Mr. Cheliden:

I live at 2862 22nd Street. Frank Scarpatura lives with me. He has lived there about two years, more than two years. I remember the 27th day of September, 1934. He was sick in bed, and I went to the drug store to buy some medicine for him, and he was several days in bed. He had a bad cold and fever. I could not call a doctor because there was no money. He needed a doctor but he couldn't afford to get one. I remember December 22, 1934, I went in the store to cash a check for $32. I gave

(Testimony of Mrs. Frances Scardocci.)
it to Mr. Scarpatura and he gave me $10 and kept the rest of it.

Cross Examination

By Mr. Licking:

Frank Scarpatura has been living with me two years. He used to go in the country and stay for a while and came back. It was last September he was sick, the 27th, 28th, 29th and 30th, and October 1. The only way I remember is I had no money, and I could not get any doctor for him. He began to get sick the evening of the 27th and after that he was sick with fever and cold. I remember there was no money, and I didn't know what to do. The only way I remember this was I didn't have any money, and I could not get any doctor, I know it was the 27th, 28th, 29th, of September, and October, five or six days. On the anniversary of [94] his father's death and his mother's death he always stayed home. I understand some words, but I cannot understand everything. I know Jimmy for two years that he lived with me. He told us his name was Frank Scarpatura. By "us", I mean everybody that he knows. I know him pretty well. He is the man in the Court-room now. I know that his name is Frank Scarpatura. I am telling the truth. I have not deceived anybody, I have been telling the truth. I don't remember of ever having seen Mr. Strange before. Yes, I saw Mr. Geauque before. Yes, I saw that picture before. This

(Testimony of Mrs. Frances Scardocci.)

gentleman came around to my place several times and asked me if Jimmie lived there, and where Jimmie was, and whether I knew Jimmie. They showed me this picture at that time. I told them I knew Jimmie but I did not know where he was. I saw the picture and I told them that I knew the gentleman but I didn't know Jimmie Pasqua. They asked me about Jimmie Pasqua.

The picture is admitted for purpose of identification.

I did not want to tell them that a man was living at my home, because I didn't have a husband. He was the only party living at my home.

Mr. CHELIDEN: The defendant Pasqua rests.

Mr. LICKING: I would like to have Mr. Strange take the stand for just a moment.

ARCH A. STRANGE

Thereupon Arch A. Strange was recalled for the United States in rebuttal, and testified as follows:

By Mr. Licking:

In the course of my investigation of this case I had occasion to question the lady who was just on the stand; on one occasion. At the time of questioning her I showed her a picture of the defendant, Jimmie Pasqua. I knew at that time that he had used the name of Frank Scarpatura. I only

(Testimony of Arch A. Strange.)

questioned her as to Jimmy Pasqua, as I recall. She said that she did not know [95] Jimmie Pasqua. I showed her a photograph of Jimmie Pasqua. That is the photograph that I showed her. She said, "I know the man, but he does not live here." I told her we had seen him enter her place on occasions at night and come out in the morning, and we thought he lived there, but she said he did not live there, just she and her daughter lived there. We asked her where he was and she said she did not know.

Mr. LICKING: I now move the introduction of this photograph in evidence.

Mr. CHELIDEN: I object to the introduction of that photograph as immaterial, irrelevant and incompetent, and it has not been connected up, not within the issues of this case.

The COURT: The only thing is, the witness did not deny it was a picture of the defendant.

Mr. LICKING: If it may be stipulated that is a correct representation of Pasqua there is no point in introducing it.

The COURT: The witness thought it was from her testimony. That is all.

Mr. BRENNAN: No questions. I would like to renew my motion on the same grounds.

The COURT: Overruled.

Mr. BRENNAN: Exception.

Exception No. 33

Mr. LICKING: The Government rests.

The COURT: We will take an adjournment now until tomorrow, Thursday, June 13, 1935, at ten o'clock a. m.

(After the usual admonition of the jury an adjournment was here taken until tomorrow, Thursday, June 13, 1935, at ten o'clock a. m.) [96]

The COURT: The jurors being present in the jury box, the defendant being present, counsel on both sides being present, let me ask this question: Will your opening address take over twenty minutes?

Mr. Hammack: No, your Honor.

The COURT: Then I presume we may have it this morning. I am very anxious to have this case concluded today, the situation being this: if we do not send this case to the jury today we cannot proceed with the other case tomorrow morning, because there are several jurors on this jury who are on the other jury, in the case set for hearing tomorrow morning. Therefore, I am anxious to have this case go to the jury today. You will have an hour in which to present your case to the jury, and each of the counsel for the defendants will have a half hour. We may proceed, then.

Mr. BRENNAN: If your Honor please, through inadvertence I neglected to renew the motions at the close of the case last evening, the motion I had previously made to strike certain testimony and a motion for a directed verdict, and at this time, on the same grounds I urged at the time those motions were made, I renew those motions.

The COURT: The application will be denied.
Mr. BRENNAN: Exception.

Exception No. 33 A

The COURT: You will proceed with the opening argument on the part of the Government.

Argument [97]

Thereupon the Court instructed the Jury and at four o'clock June 13th, 1935 the Jury retired for deliberation and at 10:20 P. M. of said day, the Jury returned in the Court with a verdict of guilty as to the defendant Jimmy Pasqua, whose true name is Frank Scarpatura as to the counts one, two, five, nine, ten and thirteen; and as to the defendant Salvatore Maugeri upon the thirteenth count.

Thereupon the counsel for both defendants made motions for new trial, of an arrested judgment upon all the statutory grounds which motions were denied by the Court and exceptions duly taken.

Exception 34

Wherefore the defendant Salvatore Maugeri prays that the foregoing be settled, allowed and signed as his bill of exceptions in the above entitled matter.

CHARLES H. BRENNAN
EDMUND J. DUNNING
Attorneys for Appellant. [98]

[Title of Court and Cause.]

STIPULATION THAT BILL OF EXCEPTIONS MAY BE SETTLED AND ALLOWED AND APPROVED AND CERTIFIED

IT IS HEREBY STIPULATED that the foregoing sixty (60) pages truthfully set forth the proceedings had upon the trial of the defendant SALVATORE MAUGERI and that they contain in narrative form all of the testimony taken upon said trial together with all of the objections made by said defendant and the rulings thereon and the exceptions noted by said defendant; and that the foregoing may be settled, allowed and certified as the Bill of Exceptions in the above entitled matter:

AND IT IS FURTHER STIPULATED that an Order be made by the Court that the Clerk of said Court file the same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

DATED: July Thirteenth, 1935.

H. H. McPIKE
United States Attorney
By VALENTINE C. HAMMACK
Assistant United States Attorney
CHARLES H. BRENNAN
Attorneys for defendant.
EDMUND J. DUNNING
Attorneys for defendant.

[Endorsed]: Service of the within Order by copy admitted this 16 day of July, 1935.

H. H. McPIKE,
Attorney for Plaintiff.

[Endorsed]: Filed Jul. 24, 1935. Walter B. Maling, Clerk. [99]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above-entitled Court;

You will please prepare and certify transcript on appeal including:

Indictment.

Bill of exceptions, order and stipulations settling and certifying the same.

Assignments of error.

Motion for new trial and ruling thereon.

Motion for arrest of judgment and ruling thereon.

Notice of Appeal.

Verdict, judgment and sentence.

CHARLES H. BRENNAN
Attorney for Defendant
EDMUND J. DUNNING
Attorney for Defendant.

[Endorsed]: Received a copy of the within Praecipe this 26th day of July, 1935.

H. H. McPIKE,
Per V. C. H.
CHARLES H. BRENNAN
Attorney for Defendant
EDMUND J. DUNNING
Attorney for Defendant.

[Endorsed]: Filed Jul 27, 1935. Walter B. Maling, Clerk. [100]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 100 pages, numbered from 1 to 100, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of The United States of America vs. Salvatore Maugeri No. 25364-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Ten & 10/100 ($10.10) Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this ..... day of August, A. D. 1935.

[Seal] WALTER B. MALING
Clerk.
By C. W. CALBREATH
Deputy Clerk. [101]

[Endorsed]: No. 7901. United States Circuit Court of Appeals for the Ninth Circuit. Salvatore Maugeri, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed August 19, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

14

No. 7901

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT, SALVATORE MAUGERI.

CHARLES H. BRENNAN,
EDMUND J. DUNNING,
315 Montgomery Street, San Francisco,
Attorneys for Appellant, Salvatore Maugeri.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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No. 7901

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT, SALVATORE MAUGERI.

A HISTORY OF THE CASE.

Appellant, as co-defendant with Gaspare La Rosa and Jimmie Pasqua, was charged in an indictment containing thirteen counts and returned by the Grand Jury on April 23rd, 1935, with certain violations of Sections 263 and 265 of Title 18, U. S. C. A., and with a conspiracy to violate the provisions of said sections, without specific reference to any code section.

The trial of the case before a jury was commenced on June 11th, 1935. During its progress, six of the counts in the indictment as against the defendants, Salvatore Maugeri, hereinafter referred to as the appellant, and Jimmie Pasqua, were ordered dismissed by the Court upon motion of the United States Attorney.

On June 13th, 1935, the jury returned a verdict of acquittal on six of the remaining counts of the indictment and of conviction upon one count, that in which conspiracy had been charged, in the case of appellant.

Judgment was thereafter pronounced, the Court sentencing appellant to a term of two years imprisonment in a United States Penitentiary and ordering him to pay a fine of five thousand ($5000.00) dollars.

THE INDICTMENT.

Twelve substantive offenses were charged in the indictment. They were set forth in such manner as to constitute six groups of two each; that is to say, their arrangement was in such order that, beginning with the first, each alternate count to and including the eleventh, charged all three defendants with a violation of Section 263 of Title 18, U. S. C. A., in that "in the City and County of San Francisco, State of California, within said Southern Division (of the United States District Court for the Northern District of California), then and there being (they), did then and there unlawfully, wilfully, knowingly and feloniously, with intent to defraud, the United States and certain persons to the Grand Jurors aforesaid unknown, keep in their possession and conceal a certain falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited obligation and security of the United States, that is to say a falsely made, forged and counterfeited Federal Reserve note of the Federal Reserve Bank of New York, New York, which

said note had theretofore been falsely made, forged and counterfeited to represent a Federal Reserve note of the denomination of ten dollars, as said defendants well knew, which said falsely made, forged and counterfeited Federal Reserve note is more particularly described as follows, to-wit (each separate Federal note description set out):

Beginning with the second count, each alternate count to and including the twelfth, charged that all three defendants violated Section 265 of Title 18, U. S. C. A., in that they did "pass, utter, publish and sell" the certain note described in each preceding odd-numbered count, "with intent to defraud the United States" and some certain different person named in each count.

Thus, while each count charged a separate offense, but six instances were alleged wherein a Federal note in question was possessed or concealed and passed or uttered.

Counts 3 and 4, 7 and 8, 11 and 12 as against appellant, Salvatore Maugeri (and defendant Pasqua), were ordered dismissed by the Court upon motion of the United States Attorney during the trial. Counts 1 and 2, 5 and 6, 9 and 10, were submitted to the jury as against appellant (and defendant Pasqua), along with count 13 which charged the three defendants with conspiracy to "keep in their possession and conceal" and to "pass, utter, publish and sell" certain "falsely made, forged and counterfeited notes purporting to be issued by a banking association, doing a banking business, authorized and acting under the laws of the United States, to-wit, the Federal Reserve

Bank of New York", etc., and which set out eight alleged overt acts.

With six of the counts dismissed, appellant was acquitted upon the remaining six substantive counts. He was found guilty alone upon the count charging conspiracy.

Defendant Jimmie Pasqua, true name Frank Scarpatura, was found guilty upon the six substantive counts submitted and upon the conspiracy count. Defendant Gaspare La Rosa had previously pleaded guilty to all thirteen counts.

ASSIGNMENT OF ERRORS.

1. The trial Court erred in refusing to grant timely motions of the appellant to strike from the record the testimony of each of the twenty-four witnesses for the prosecution upon the grounds that it was incompetent, irrelevant and immaterial and hearsay as to appellant and upon the further ground that no conspiracy had been proven in said action as against appellant.

2. The trial Court erred in refusing to grant the motion of appellant for a directed verdict of "not guilty" made at the conclusion of the government's case, thereby allowing the case against appellant to go to the jury.

3. The trial Court erred in refusing to grant the motion of appellant for a directed verdict of "not guilty" at the conclusion of all the evidence in the case.

4. The evidence is insufficient as a matter of law to support a verdict of "guilty" against defendant.

SUMMARY, OR DIGEST, OF TESTIMONY OF GOVERNMENT'S WITNESSES, CONSIDERED IN GROUPS.

Inasmuch as that twenty-four witnesses gave testimony for the government in the trial of appellant, it may facilitate matters somewhat to segregate them into the two classifications, or sets, or groups, under which it probably will be more convenient to consider their relation to the inquiry made at the trial. The first group consists of sixteen persons. We fail to find in their testimony even the mention of the name of appellant, Maugeri, nor reference to any act or word of his, however remote, either upon the dates named in any of the substance counts of the indictment or before, during, or after the indefinite period encompassed by the alleged duration of the conspiracy charged.

It is, then, within the limited group of eight witnesses, or second group, that we may analyze the testimony to ascertain, if possible, any facts that would, under the settled law, support the verdict of guilty returned against appellant upon the conspiracy charge.

Among the first, or major group, are five of those who gave testimony concerning ten of the twelve substantive charges, which we have come to consider in the light of six separate incidents or occasions, in which counterfeit notes are alleged to have been possessed or to have been passed upon various persons.

(Two witnesses, not included in this group, but in the second group, related stories concerning one incident —a sixth incident—in which a note was passed.) Three others of this major group of sixteen testified to the passing of notes at times and places not set forth in the indictment.

Not one of these eight witnesses, according to their testimony had ever seen, heard of, or talked to the appellant Maugeri. By their testimony, it can now be said that he was not present at or near the scene upon any occasion when a bill was passed. Nor is there anything in their recitals upon the stand which, in the slightest degree, suggests that the appellant here was even distantly connected with the transactions in which the notes were passed, or that he had any knowledge that they were possessed or were to be passed, that they were possessed or were being passed, or that they had been possessed or passed.

The testimony of these witnesses covers five of the occasions in which there can be no doubt from the record that counterfeit notes were passed, though not by appellant, but by others, to-wit, the defendants Pasqua and La Rosa, sometimes acting singly and in other instances together. The sixth situation covered by the indictment presents, in its analysis, the same result. The counterfeit note was passed by defendant Pasqua. Appellant was not present at the time. There is no proof that he knew the note was possessed by Pasqua, or any one, or to be passed, was possessed by Pasqua, or any one, or was being passed or that it had been possessed byPasqua, or any one, or had been passed. The two witnesses, as to this sixth incident,

who are from the smaller group of eight, did testify that they knew Maugeri, that he had been a customer at the service station where they were employed for some time previous to and subsequent to the date upon which the note was passed; that sometime previously, according to one of these two witnesses, Maugeri and Pasqua had visited the service station together; that appellant had once asked that defendants Pasqua and La Rosa be given rates for service; that appellant had frequently made purchases at the station for which he paid in coins and currency of various denominations, none of which had ever been the subject of investigation or inquiry by government authorities, or any one else, regarding the question of their genuine or spurious character and none of which was in question at the trial.

There are left, then, the other witnesses, eight from one group and six from the other, whose testimony in no way is related to the passing of or the possession of the counterfeit notes upon the six occasions enumerated in the indictment or upon three other occasions not mentioned therein, but admitted in evidence. A careful study of their testimony establishes the fact that it is as devoid as is the testimony of the others of any criminal act denounced by federal penal statutes on the part of appellant.

In the main, there are but five subject matters discussed in their testimony that could be regarded as bearing upon the guilt or innocence of appellant. The first of these is the purchase by appellant of a certain second hand Studebaker machine more than a year and a half before it is alleged the first counterfeit

note was passed and from which machine certain automobile license plates are alleged to have been taken by someone whose identity was not disclosed which later appeared affixed to a certain Essex car in which, on two occasions, appellant's codefendants were seated when notes were passed; the second is one in which appellant accompanied one of his co-defendants in the Essex car to a repair shop and ordered work done upon the car, for which he paid; the third is the purchase of an automobile tire by appellant which was later placed upon the Essex car; the fourth concerns a trip to San Mateo by appellant in his own automobile to assist one of his codefendants to place, or to have placed, upon the Essex car, an automobile tire and to follow, in his own car, the disabled Essex machine as it was being driven back to San Francisco by the codefendant; and the fifth, the association of appellant with the codefendants. On none of these occasions was a questioned note passed nor did any of the occasions occur upon a date when such a note was passed.

This summary, or digest, may simplify the endeavor to discuss the facts, with the law applicable thereto, and to isolate (or make clear) the errors committed by the trial Court as complained of by appellant.

Further Analysis of Testimony Showing Inconsistency of Verdict.

It will be remembered that six of the substantive counts, covering three of the note passing incidents were dismissed upon motion by the Government. Considered in their order they were counts 3 and 4, in the second of which it was alleged that a ten ($10.00)

dollar counterfeit note was passed by all three defendants upon a Mrs. W. F. Buchan, bakery keeper at Lyon and Fulton Streets in San Francisco; counts 7 and 8, in the second of which it was charged that a ten ($10.00) dollar note was passed upon William F. Byrnes, grocer, of 260 Octavia Street, San Francisco; counts 11 and 12, in the second of which it was charged a ten ($10.00) dollar note was passed upon Dino Chelini and Gio Risoni, employed in a restaurant on 11th Street, San Francisco.

Testimony was received by the Court as to these three transactions, as well as to the other three recited in the indictment, and the three not mentioned in the indictment, all over the objection of appellant herein, properly and timely made, as to its irrelevancy, immateriality and incompetency, its hearsay character and upon the ground that no conspiracy had been shown. We have seen that there was no evidence whatsoever connecting appellant in these three transactions, the District Attorney so admitting, even as an aider and abbettor, as an accessory, or as a conspirator, which was the promise of the United States Attorney to do (Tr. Rec. pp. 49, 50, 51 and 54), and it was proper that the charges should have been dismissed. We are forced to say, yet respectfully, that upon some incomprehensible theory the other three substantive groups (six counts) were allowed by the Court to stand despite appellant's objections and were submitted for the consideration and judgment of the jury when, upon an examination of the record and under any hypothesis or basis or reasoning, it must be plain that no more evidence was adduced against appellant

upon the substantive counts retained than upon those rejected. By no process of sound reasoning can it be maintained that appellant should have his liberty jeopardized in the one instance and be relieved of such jeopardy in the other, where basically and in detail there was no distinction to be made in the character, weight or legal sufficiency of the evidence.

Since the jury found appellant utterly guiltless under the substantive charges submitted by the Court, there is ample and added justification for this contention. The jury determined by its verdict that appellant was neither aider, abettor nor accessory in the passing of or possession of the counterfeit notes involved in the six counts submitted, as the Court had found in the case of the other six counts. It would require more restraint than is here commanded to refrain from commenting upon the obvious fact that, since appellant was convicted alone upon the conspiracy charge, the submission of the substantive charges for the deliberation of the jurors, in all human likelihood, caused prejudice in the minds of the jurors to an extent where appellant's liberty became the sacrifice under the conspiracy charge. Had appellant's motions, first to exclude and later to strike from the record the testimony adverted to, been granted, as the Court, appellant contends, in error refused to do, appellant would not have had to suffer the effect of having his case considered by the jury in light of the apparent concurrence by the Court in the position of the United States Attorney that evidence of aiding and abetting the guilty parties had been indulged in by appellant in several instances precisely similar to

those in which, for some reason, the Government was willing to confess no case had been made against him.

Attention is directed to the testimony of Mrs. Jewell Simpson (Tr. Rec. beg. p. 49); Earl Roberts (Tr. Rec. beg. p. 55); Clarence Smith and Henry D. Apparius (Tr. Rec. beg. p. 62 and Tr. Rec. p. 66). These are the witnesses who testified to support the substantive charges submitted to the jury. Comparison of their testimony with that of Mrs. W. F. (Alma) Buchan (Tr. Rec. beg. p. 60); Mrs. W. F. (Betty) Byrnes (Tr. Rec. beg. p. 59) and Tony Rosini (Tr. Rec. beg. p. 70), will show appellant to have been just as guiltless in the transactions of note passing described by the first four witnesses, used to establish the substantive counts ordered submitted, as in those dismissed, yet with the Government admitting failure of proof in the one set of circumstances, the Court, over objection of appellant, conceded the Government's demand to subject the appellant to unnecessary risk of a priceless possession upon like insufficient proof under another set of circumstances and exposed him to the element of prejudice which such erroneous rulings created. The mere fact that the jury held views different from those of the Government and the Court as to the insufficiency of this evidence, does not alter the situation in any particular concerning the prejudice which undoubtedly attached in the minds of the jurors to the degree that it could have, and undoubtedly did, influence their decision upon the question of appellant's participation in a conspiracy.

Although the rule is here recognized that a defendant, under such circumstances, may not have participated in the commission of a so-called substantive offense and that he may yet have conspired with others who were the actual perpetrators of the offense, contemplation of the inconsistent and anomalous verdict rendered in appellant's particular case cannot be avoided. On the one hand it was declared by the verdict that appellant did not aid, abet, accede to or participate in any way in the passing of the notes, which in itself is a declaration that he had no knowledge that notes were possessed or were to be passed, were possessed or were being passed or had been possessed or passed, and on the other hand, by some blanket process of deduction, offensive to the accepted rules of logic, the jury resolved that appellant conspired with those whom he neither aided, abetted, counselled or joined in their enterprises. It is not possible to abet another in the doing of a thing without knowledge of the thing to be done. It is not possible, as a matter of law, to conspire to do a thing without knowledge of the thing to be done. The jury found that appellant did not abet the codefendants who committed the wrongful acts in this case, determining that he knew nothing of their acts, while they indulged in the inconsistency of determining that he conspired with them, which implies knowledge.

Before dismissing this phase of the case, it seems necessary again to refer to the rulings of the trial Court admitting in evidence, over objection of appellant, the testimony of the witnesses who told of the three transactions concerning the passing of notes

upon which the indictment was silent. These witnesses are John Lytle (Tr. Rec. beg. p. 73); Ivan Barrett (Tr. Rec. beg. p. 75) and Ellsworth J. Ramos (Tr. Rec. beg. p. 77). In each instance, the witnesses identified appellant's two codefendants as having passed the spurious notes. They never mentioned appellant. In each case, appellant's two codefendants occupied a certain Hupmobile automobile which had been purchased according to the testimony of William H. Bailey, alone by defendant Jimmie Pasqua, true name Frank Scarpatura. Bailey never mentioned appellant. Certainly, there being no syllable in the record to connect appellant with the purchase of, the knowledge of the existence of, or the use of the Hupmobile machine for any purpose, legal or otherwise, it becomes most perplexing to understand how this testimony became relevant or admissible against appellant upon any theory. No conspiracy had been shown. It surely did not support the theory of the Government that appellant had aided or abetted the commission of any substantive offense charged. But nevertheless, it was admitted, and it must be plain that appellant suffered prejudice thereby.

RECORD SHOWS THEORY UPON WHICH GOVERNMENT PRESENTED CASE AGAINST APPELLANT.

It will be observed from the record that the United States District Attorney, following objections and the motion to strike during the giving of the testimony of Mrs. Jewell Simpson, the first Government witness, declared definitely that he would "connect" the

testimony by other evidence against appellant "as an aider and abettor" ("aider and abettor" used in the conjunctive); "that appellant was an accessory" and, that the Government was "going to prove the conspiracy charge" (as against appellant). This was the announced theory upon which the Government presented its case.

Here is the record (Tr. Rec. pp. 49, 50, 51 and p. 54):

(Testimony of Mrs. Jewell Simpson.)

"Mr. Brennan. 'Now, if your Honor please, I move that the testimony of this witness, as far as the defendant Maugeri is concerned, be stricken from the record, upon the ground that it is immaterial, irrelevant, and incompetent, and hearsay as to the defendant Maugeri.'

Mr. Hammack. *'I will say that the same will be connected up later.'*

The Court. *'You will make the assurance you will connect it up by other evidence with the defendant Maugeri?'*

Mr. Hammack. *'Yes, as an aider and abettor.'*

Mr. Brennan. 'May I make the further objection that no conspiracy has been established.'

The Court. 'Of course, I have the assurance of the United (40) States District Attorney that he will connect it up; all the evidence cannot be put on at once; it is only a matter of order of proof. I have a right to receive the proof upon the assurance of the District Attorney that he will connect it up. Of course, if he fails you are in a position then to renew your motion to strike at the conclusion of the trial.

At this time I will deny the motion upon the assurance. *I presume that you also give the assurance that you are going to prove the conspiracy charge.'*

Mr. Hammack. *'Yes.'*

Mr. Brennan. 'Of course, with perfect respect for the Court and its ruling, might I suggest that no reference has been made in the testimony of this witness whatsoever to the defendant Maugeri.'

The Court. 'The point is this, the Government is trying to present its case on the first count. The first count gives the number of a bill similar to the one that has been offered for identification. It is simply a matter of proof, and if the Government fails to put in sufficient evidence upon which the connection is made your motion to strike out would have to be granted, but at this time I cannot grant it, *because I have to give the United States Attorney a chance to establish, if he can establish by such evidence in his hands, in the substantive counts that your client was an accessory,* and *in the conspiracy count he was one of the conspirators.'*

Mr. Brennan. 'Might my motion run both to the indictment in its entirety, and as to counts 1 to 12 in particular, and count 13 in particular?'

* * * * * * *

(Page 54.)

Mr. Brennan. 'No question on behalf of the defendant Maugeri. At this time if your honor please, I renew my motion or rather make my motion with reference to the testimony of the witness Blach, who just left the stand as I did upon the occasion of (43) the witness Simpson, first on the stand. No mention

having been made of the defendant Maugeri in the testimony of the last witness, and I make the motion upon the grounds that have been heretofore mentioned by me.'

The Court. *'I presume that this evidence is directed to the conspiracy count?'*

Mr. Hammack. *'Yes, directed to the conspiracy and aiding and abetting, and will properly be connected up with the substantive count.'*

The Court. 'I will deny your motion at this time.'

Mr. Brennan. 'May we have, respectfully, an exception?'

The Court. *'I will not be able to pass upon this until such time as the United States Attorney advises me he has presented all the evidence for the purpose of connecting it up.'* "

The record further shows that the same objections by appellant ran throughout the case as to each witness and that the testimony was admitted upon the same theory by the Court and under the same promise by the District Attorney to connect all the testimony in such manner as to establish the proof that appellant both "aided and abetted" *and* "conspired" *to commit the offenses alleged in the thirteen counts of the indictment.*

THE LAW.

Appellant is held guiltless on all of the first twelve (substantive) counts, six of which were dismissed upon the Government's motion, after jeopardy had attached, and six of which resulted in the jury's ver-

dict of acquittal. It is therefore judicially established that appellant did not commit the unlawful acts thus complained of, that he was not present, either actually or constructively, when they were committed, and that he did not counsel, encourage, incite, instigate, participate in, accede to, have knowledge of their commission, or give aid or comfort to their perpetrators, either before they were committed, while they were being committed or after they were committed. In absolving appellant under the first twelve counts, the Court and the jury determined that he had no knowledge of the criminal acts of the others. If he had no knowledge of the acts, he did not nor could not have conspired with them.

Mr. Justice Hart, in the case of *People v. Yee,* 37 Cal. App. 579 (174 Pac. 343), at pages 583 and 584, very lucidly and unmistakably lays down the rule that is universally recognized in the authorities, as follows:

> "But, as will be observed, the Court followed the language thus referred to with the statement that, to justify a conviction of one who did not himself actually commit the criminal act, it must be shown that he aided, assisted *and* abetted therein, the word 'abetted', unlike the words immediately preceding it, including *'knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime'* (People v. Dole, 122 Cal. 486; People v. Bond, 13 Cal. App. 175, 185, 109 Pac. 150). Thus the rule was clearly and correctly stated to the jury, and it cannot be doubted that they well understood from it that, *to warrant the conviction of a person who did not himself actually commit a crim-*

inal act, it was requisite to show that he abetted, or what is the equivalent in legal signification of that word, criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act" (italics ours).

In *People v. Dole,* 122 Cal. 175, at pages 184, 185, the Court defines the word "abet":

> "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime."

Quoting from the case of *State v. Talley,* 102 Ala. 25 (15 South. 722, 737), the California Court of Appeal said in *People v. Bond,* 13 Cal. App. 175, at page 185:

> "The legal definition of aid is not different from its meaning in common parlance. It means to assist, 'to supplement the efforts of another' (Rapalje and Lawrence's Law Dictionary, p. 43). 'Abet' is a French word compounded of the two words 'a' and 'beter'—to bait or excite an animal; and Rapalje and Lawrence thus define it: 'To abet is to incite or encourage a person to commit a crime.' An abettor is a person who, being present in the neighborhood, incites another to commit a crime and thus becomes a principle in the offense."

In *Bradley v. Commonwealth,* 257 S. W. 11, 13, 201 Kentucky 413, the Court held that

> "to constitute one an 'aider' or 'abettor' in the commission of a crime he must be actually or constructively present at the time of its commis-

> sion and participate in some way in the act committed. It is not essential that there should be a prearrangement or mutual understanding, or concert of action, but in the absence of these, it is essential that one so charged should in some way, *either by overt act* or *expression of advocacy or sympathy, encourage the principal in his unlawful acts.*"

State v. Powell, 83 S. E. 310, elucidates the point still further.

We find in 7 *Cal. Jur.* 889, this note:

> "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the word 'abet' *includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime*" (italics ours).

The following cases are cited:

People v. Morine, 138 Cal. 626, 72 Pac. 166;
People v. Yee (supra);
People v. Bond (supra);
People v. Lewis, 9 Cal. App. 279, 98 Pac. 1078.

Other authorities, too numerous to mention, hold that *one cannot "abet" a person in committing an act without knowledge of what is to be done.*

Now we come to one of the best considered cases upon the subject of conspiracy that the authorities afford. It is the case of *Lucadamo v. U. S.,* 280 Fed. 653, where the Court, at pages 656 and 657, clearly and correctly defining the crime of conspiracy, says:

> "The elements of the crime (conspiracy) are: First, an object to be accomplished which must be, in this instance, the commission of the offense

against the United States; Second, an agreement or understanding between two or more persons, whereby they become committed to co-operate for the accomplishment of the object by means embodied in the scheme or by any effectual means, and a place or scheme embodying means to accomplish the object; Third, an overt act by one or more of the conspirators to effect the object of the conspiracy. It was sufficient to submit the evidence to the jury, since it appeared that the jury might find that the minds of the parties met understandingly, so as to bring about an intelligent and deliberate agreement to do the acts and commit the offense charged. *A defendant can be guilty of committing an offense, by consenting thereto, only where his consent is of that affirmative and express character which amounts to counselling, aiding and abetting in the commission of the offense.* Woo Wai v. U. S., 223 Fed. 412, 137 C. C. A. 604.

Unless the scheme, or some proposed scheme is in fact consented to or concurred in by the parties in some manner, so that their minds met for the accomplishment of the proposed unlawful act, there is no conspiracy. United States v. Cole (D. C.), 153 Fed. 803. So that mere knowledge, or approval of the act, without co-operation or agreement, is not enough to constitute a party to a conspiracy (Patterson v. U. S. 222, Fed. 599, 133 C. C. A. 123). To constitute a party to a conspiracy, the evidence must show an intentional participation in the attempt to commit the offense. Marrash v. U. S., 168 Fed. 225, 93 C. C. A. 511" (italics ours).

The *Woo Wai* case, cited in the *Lucadamo* decision, was decided by the Honorable Court of this district.

It holds that knowledge is necessary to establish the charge of conspiracy.

In the instant case, the Government was allowed by the Court to develop all of its proof, over objection, as to each detail of the twelve substantive charges and as to the conspiracy. Under the rulings of the Court and under the declared theory of the United States District Attorney all the testimony went to prove all the charges. The Government confessed its failure as to six of the substantive charges, but insisted that the evidence as to the other six of the first twelve charges, precisely similar, be submitted to the jury along with the conspiracy charge, which the Court ordered.

It would have been impossible for the jury to have considered the evidence as to the substantive charges, without considering the evidence as to the conspiracy charge, and vice versa. All evidence independent of the possession, concealing, passing or uttering the counterfeit notes bore a relation to the other evidence offered to prove conspiracy, since, in this case, all of the unlawful acts of possession and passing given for the consideration of the jury were actually committed by either one or both of appellant's two codefendants. No unlawful act was relied upon to prove conspiracy that was not included in what the Government offered as proof of the substantive offenses. Testimony as to three other transactions where notes were passed by these two, and not stricken out upon appellant's motion, showed the acts to have been done without the remotest knowledge or participation of appellant, with no possible connection of his, and at a time when

the codefendants appeared at the scenes of the offenses in a certain Hupmobile automobile, the very existence of which, so the record shows, appellant was wholly ignorant of—had never seen, heard of or ridden in nor been near. Neither was he at or near the scenes of the note passing in these three instances, or in any instance. And, again, not the slightest evidence appears in the record that he even knew the two codefendants were to be at any of the places named on their nefarious errands.

So, it must follow, that when the jury acquitted appellant on the six substantive charges, the Court having dismissed the other six, it stood adjudicated: first, that appellant was not present, actually or constructively, when the crimes of possessing or passing counterfeit notes were committed by others; second, that he did not aid, abet, counsel, encourage, instigate, inspire, suggest or comfort the criminals in their acts by any act, word or deed of his; *third that he did not have knowledge of their acts or their intentions before, during or after the commission of the acts.*

Any testimony sufficient to warrant a conviction on the conspiracy charge, was likewise, in this case, sufficient upon which to base a conclusion that appellant aided in and abetted, or aided in or abetted, the unlawful acts. All of the evidence was as applicable to the one set of charges as to the other charge. The same legal requirements applied in the one instance, *in this particular case,* as in the other instance. To be guilty of conspiracy, appellant must have been guilty of aiding and abetting the guilty parties, with, of course, *knowledge of their plans or*

schemes, as the Government contended in its case. To have been found innocent upon the one theory, where knowledge or participation was the same requisite, bespoke appellant's innocence under the other, or consistency and reason have gone from the law.

DISCUSSION OF TESTIMONY RELATIVE TO OVERT ACTS.

We have seen that no evidence offered against appellant, and admitted in the first instance only upon the theory that the order of proof might be determined by the Court, and so being admitted, would be "connected up" (Tr. Rec. p. 50, lines 18 and 19) by the District Attorney against appellant as an "aider and abettor" (conjunctive) (Tr. Rec. p. 50, lines 9 and 10), as "an accessory" and as "one of the conspirators" (Tr. Rec. p. 51, lines 10 and 11), was sufficient to convict him as either a principal or aider and abettor. What, then, of the evidence other than the direct testimony concerning the possession and passing of the notes, bearing only upon the acts of the codefendants? Could it, if detached (even if it were possible so to do in this case), be sufficient to establish conspiracy? A review, as brief as possible, will be sufficient to answer the question.

Appellant purchased a second hand Studebaker automobile on June 1st, 1933, for "some relative or somebody out of town" (Tr. Rec. p. 84, line 28). In 1934, this car was registered under California State license 3-J-826 with J. Dominec, 155 Lighthouse Ave., Santa Cruz, California, as the owner. These premises were owned by "S. Maugeri", although appellant was

not identified as this person, there being but the similarity of names (Tr. Rec. p. 57). On September 11th, 1934, more than fifteen months later, this Studebaker car, belonging to Dominec, was completely wrecked in an accident and on November 18th, 1934, thirty-eight days subsequent, it was taken by a junkman, in payment, no doubt, of his towing fee. The 1934 number plates were missing from the wrecked car. An Essex coupe, bearing California license number 3-J-826, and occupied by Gaspare La Rosa and Jimmie Pasqua, true name Frank Scarpatura, was driven into a service station at El Cerrito, Contra Costa County, California, on November 18th, 1934. La Rosa passed a ten ($10.00) dollar counterfeit bill on the attendant.

On November 17th, 1934, an Essex car, was driven into a San Francisco repair shop. Appellant and Pasqua were seated in it. Repairs were ordered and done. Four or five days later Pasqua returned the car for some minor work and two weeks or more later, appellant and another man, not identified in the trial, again called at the repair shop with the Essex, appellant saying a bearing had burned out. A tire blew out as the car was leaving the shop. The repair bills were paid by Maugeri. The repair man, who knew Maugeri, did not identify him as the owner of the car, saying he did not know who owned it. Ownership of the car was never proved by any evidence in the case. Gaspare La Rosa drove an Essex car into a service station on Bayshore Highway, San Mateo County, California, on November 28th, 1934. Its motor was noisy, it had a blown tire and the attendant

testified it was in such condition he thought "it would not get very far". Pasqua and La Rosa were in the car. Two days later appellant and La Rosa called at the station in a Studebaker sedan car, produced a tire which appellant had previously bought and they placed it on the car. This operation required some time. La Rosa drove the Essex car, disabled, toward San Francisco at a slow speed and appellant followed in his Studebaker, stopping twice at least and looking back down the road on one occasion. Secret service agent Geaque and a fellow officer observed the Essex car on another occasion driven by Pasqua when a tire blew out on a street in San Francisco. At the time appellant was in the vicinity in his Studebaker car.

On none of these occasions touching upon the repair of the car, the purchase of tires and the like is there any evidence that a counterfeit note was passed by anyone or that appellant ever heard of or saw one or discussed one with either of the codefendants. Geaque on other occasions saw Pasqua and appellant together. On the night of December 27th, 1934, Geaque saw La Rosa and Pesqua leave appellant's house together.

These are substantially all of the other facts in the case, testified to principally by witnesses included in the smaller group of eight witnesses which, at the beginning of this brief, was here formed for the purpose of better understanding the testimony. It will be seen that there is no connection with appellant upon any date upon which a counterfeit note was passed anywhere by the codefendants in the case.

If any act done by appellant as related by the testimony just considered is to be regarded at all in

this case it must, we contend, be taken in the light of his innocence with which the law, throughout the trial, clothed him. No one of the acts, nor all of them together, is sufficient to proclaim his guilt. There is none which is not susceptible of the interpretation of innocence rather than of guilt, and the settled law fixes it as the duty of both the Court, in the first instance, and the jury, next, so to determine. There is none which could be regarded as furthering any of the acts in the substantive counts, with knowledge, since we know by the Court's dismissals and the jury's acquittals under the aiding and abetting theory, that he had no knowledge of any such acts, or intended acts.

It is necessary here to emphasize that the license plates said to have been on the Studebaker car wrecked at Santa Cruz in September, 1934, and bearing the California number 3-J-826 were 1934 license plates and were registered to the owner, one Dominec. The car had been purchased by appellant sixteen months before, in June, 1933. There is not a word in the record that appellant ever saw or heard of the car again, either before or after it was wrecked. He did not live in Santa Cruz, but in San Francisco, with his family, and the record does not disclose that he ever visited Santa Cruz in all that time for any purpose. He could not have known what the 1934 license was, as far as the record goes, and even if the record showed that he knew that the license 3-J-826 was on the Essex car in question, he could not have known that it was from another car which he had not seen since six months or more before the 1934 licenses were

required by California law to be affixed to automobiles in use in the State. How the license plates in question came to be on the Essex car was not determined or suggested by any evidence in the case, and it cannot, as a matter of law, be merely guessed that appellant caused them to be put there, or that he knew that they were there.

That appellant knew La Rosa and Pasqua there can be no doubt, but that fact, or his association with them on several occasions, imports no guilt to him under the law. Mere association is not an element sufficient to prove conspiracy.

Nor is the fact that he paid for the repair of the Essex car sufficient evidence, even taken into consideration with the other facts, upon which to found his guilt when the act performed by him may quite as well have been done innocently as with guilty knowledge of, or in aid of, the unlawful operations of those with whom he was when the work was ordered. The purchase of the tire and the assistance he rendered in having it affixed to the disabled Essex in San Mateo are likewise acts which the law compels to be regarded under the hypothesis of innocence.

LEGAL ARGUMENT IN SUPPORT OF FOURTH ASSIGNMENT OF ERROR.

No act of appellant shows his knowledge of a criminal scheme or plan on the part of others, even though we acknowledge the rule that circumstantial evidence may establish guilt in conspiracy cases. The

more jealously guarded principle of the presumption of innocence, which must be overcome by evidence excluding every reasonable doubt, prevails. It is well within the bounds of reason to deduce that appellant was actuated by motives other than those precluding every hypothesis than that he acted with guilty knowledge or guilty participation in a scheme to violate the law.

In *United States v. Lancaster,* 44 Fed. 896, 904, the following sound observation is made, too often repeated in the authorities to bring into question its elementary character:

> "It is also true, in cases of conspiracy, as in other criminal cases, that the prisoner is presumed to be innocent until the contrary is shown by proof; *and where that proof is, in whole or in part, circumstantial in its character, the circumstances relied upon by the prosecution must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence"* (italics ours).

It is not necessary to leave our own circuit, the Ninth, to find the principle well considered and applied with approval. In the case of *Sugarman et al. v. United States,* 35 Federal, second, 663, at page 665, a conspiracy case, in a situation which undoubtedly is more cogently persuasive of circumstantial implication, the Honorable Court said:

> *"The testimony tending to connect the appellant Williams with the offense is inconclusive and unsatisfactory.* He was referred to on different occasions as one of the parties employed by the

conspirators in the transportation of liquor from boats offshore to land, but this testimony was not sufficient to connect him with the conspiracy, and was not competent for that purpose. It further appeared that he operated a boat which was later destroyed by fire, and it is claimed that this boat was employed for the purpose of transporting liquor to the shore, but this likewise appears only from statements of one or the other of the conspirators. The boat to which we have referred was searched on two different occasions by one of the officers of the Coast Guard, while operated by Williams, but no intoxicating liquor was found. At the time of his arrest Williams was in company with one Rasmussen, an alleged conspirator who died before the trial. Rasmussen had on his person at the time of his arrest a receipt given for a part payment on the purchase price of the boat which brought the liquor into the United States, as charged in the third count of the indictment, and no explanation of such possession was offered. At the time of his arrest Williams gave a fictitious name, and removed the coat he was wearing, replacing it with another. The coat thus removed was offered in evidence, and corresponds in texture with a pair of pants found in the boat which had been abandoned while attempting to introduce intoxicating liquor into the United States, as already stated. *It will thus be seen that the only competent testimony tending to connect the appellant Williams with the commission of the offense was the company he was found in, the giving of an assumed name at the time of his arrest, and the unexplained possession of a coat comparing in texture with a pair of pants found in an abandoned boat. Whatever suspicion these facts may give rise to, they are in*

our judgment legally insufficient to support a verdict of guilty" (italics ours).

And in the next case following in 35 Federal, second, that of *Chin Wan et al. v. United States,* the same Court repeats its judgment concerning the defendant, Tom Lett, whose conviction was under circumstances again infinitely stronger than those shown in the case of appellant here. Lett had driven a machine transporting narcotics to an express office, had given the package to another directing him to take the package into the express office and to do as he had been told. Mr. Justice Rudkin, again writing the decision, concurred in by Mr. Justice Dietrich and Mr. Justice Wilbur, as in the *Sugarman* (Williams) case, said:

> "As to appellant Lett, the case is entirely different. His only connection with the transactions involved in this appeal was as above set forth. It was not shown that he had any knowledge of the contents of the box transported by him, or of the criminal purposes of the other parties. He simply drove the automobile containing the box to the express office at the request of the witness La Rosa, aided him in removing the box from the automobile, told him to do as instructed, and refused to wait for him at the express office when requested to do so. As said in Sugarman v. United States (C. C. A. 5915), 35 F. (2nd) 663, just decided: 'Whatever suspicion these facts may give rise to, they are in our judgment legally insufficient to support a verdict of guilty'. Had Lett been an expressman or taxi driver of good repute, such circumstances would scarcely give rise to a suspicion against him."

In *Dickinson v. United States,* 18 F. (2nd) 887, at 893, we find:

> "Whenever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible. To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offence which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement."

Citing:

Linde v. United States, 3 Federal (2nd) 59;

United States v. Heitler, 274 Federal 401;

Stubbs v. United States, 249 Federal 511 (Ninth Circuit);

Bell v. United States, 2 Federal (2nd) 543;

Allen v. United States, 4 Federal (2nd) 688;

United States v. Cole, 153 Federal 801-804;

Lucadamo v. United States, 280 Federal 653, 657.

(Ninth Circuit). In *Haning v. United States,* 21 Federal (2nd) 508-509:

> "When all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of guilty."

Other cases to the same effect are:

Vaccario v. United States, 13 Federal (2nd) 678;

La Rosa v. United States, 15 Federal (2nd) 479;

Coleman v. United States, 11 Federal (2nd) 601;
Lewis v. United States, 11 Federal (2nd) 745;
Dow v. United States, 21 Federal (2nd) 816;
DeLucca v. United States, 298 Federal 412-413;
Tofanelli v. United States, 28 Federal (2nd) 581 (Ninth Circuit).

There are many others, but we quote *Salinger v. United States,* 23 Federal (2nd) 48, at 50:

> "Unless there is substantial evidence of facts which exclude every hypothesis but that of guilt it is the duty of the trial Court to instruct the jury to return a verdict for the accused, and where all the evidence is consistent with innocence, as with guilt, it is the duty of the Appellate Court to reverse a judgment against the accused."

In *Benn v. United States,* 21 Federal (2nd) 962, the Court observed:

> "It is highly important, of course, that this and all other criminal laws should be strictly enforced, *but it is of far greater importance that a citizen should not be imprisoned and deprived of his liberty under a judgment based on no surer foundation than mere guess work and speculation."*

The case of *Weiner v. United States,* 282 Federal 799 contains this language:

> "If the evidence is as consistent with the theory that the opium was stolen as it is with the theory that it was not stolen, the motion for bind-

ing instructions, for the reason that the allegations in the indictment had not been proved, should have been granted, and defendants' first point, that they could not be convicted under the evidence in the case, should have been affirmed. Every person is presumed to be innocent until his guilt is proved beyond reasonable doubt. The presumption of innocence is evidence in favor of the accused, introduced by the law, in his behalf. This principle is 'axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'

'It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman.' Coffin v. U. S., 156 U. S. 432, 453, 456, 15 Sup. Ct. 394, 404 (39 L. Ed. 481).

'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial Court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction.' Union Pacific Coal Co. v. U. S., 173 Fed. 737, 740, 97 C. C. A. 578, 581; Wright v. U. S., 227 Fed. 855, 857, 142 C. C. A. 379.

In the case of Hart v. U. S., 84 Fed. 799, 808, 28 C. C. A. 612, 621, Judge Acheson, of this court said:

'Now it is a familiar rule in criminal cases that, to justify a conviction upon circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.'

* * * * * * *

We are of the opinion that, under all the evidence in the case the defendants should not have been convicted of conspiracy as charged in the indictment" (judgment reversed).

CONCLUSION.

Can it be said here that, at the very most, there is aught but suspicion that appellant had knowledge of the unlawful enterprises of La Rosa and Pasqua? Is the judgment of conviction more than mere guesswork and speculation? Is there a single act of his, taking into consideration any of the overt acts alleged, that is not easily subject to an innocent interpretation, even though it might be said, which is not admitted, that any one or all of them had some color of guilt? The record is barren of any proof that he participated in the commission of any crime. The element of participation is entirely lacking. Mere association with two men who were committing crimes would not be adequate upon which to base a pronouncement of guilt. It would not of itself imply knowledge of their activities in violation of the law. Nor would any act of appellant, admitted in evidence, all remote from the instances in which crimes were committed by the others, remove him from the protection of the fixed measure of the law laid down by the Courts that those acts must be seen in the light of and under the presumption of his innocence, unless they permit of no other interpretation than that of guilt. Even if it is contended that appellant's acts circumstantially point to a guilty knowledge or

participation, is it not true under the *Lancaster* case (supra), that:

> "The circumstances relied upon by the prosecution must so distinctly indicate the guilt of accused as to leave no reasonable explanation of them which is consistent with the prisoner's innocence"?

So, then, appellant respectfully urges that he was entitled, first, to an order from the trial Court upon his motions, directing the jury to acquit on all counts remaining after the six were dismissed, the conspiracy count included, and, that failing, to his acquittal because of the insufficiency of the evidence to meet the legal requirements.

Appellant's failure to take the stand, was, of course, his constitutional right.

Appellant submits that the errors complained of were committed by the trial Court and that the evidence against him was insufficient to warrant his conviction as a matter of law.

Dated, San Francisco,
September 20, 1935.

Respectfully submitted,
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Salvatore Maugeri.

No. 7901

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 7901

IN THE

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SALVATORE MAUGERI,

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BRIEF FOR APPELLEE.

This appeal is from a judgment and order made by the United States District Court of California, sentencing appellant upon his conviction of conspiracy, to a term of two years in the United States Penitentiary and ordering him to pay a fine of five thousand dollars.

THE INDICTMENT.

The indictment in this case charges three defendants, Gaspare La Rosa, Salvatore Maugeri and Jimmie Pasqua (true name Frank Scarpatura), in twelve substantive counts with the possession and passing of falsely made, forged and counterfeited obligations

and securities of the United States; that is to say, falsely made, forged and counterfeited Federal Reserve notes of the Federal Reserve Bank of New York, New York.

The first count of the indictment charges the three defendants with the possession of one of said notes on the 28th day of September, 1934.

The second count of the indictment charges the three defendants with the passing of the same note with intent to defraud the United States and Mrs. Fremont Simpson on or about the 28th day of September, 1934;

The third count charges the three defendants with the possession of another of said notes on or about the 13th day of November, 1934;

The fourth count charges the three defendants with the passing of the same note with intent to defraud the United States and Mrs. W. F. Buchan on or about the 13th day of November, 1934;

The fifth count charges the three defendants with the possession of one of the said notes on or about the 23rd day of November, 1934;

The sixth count charges the three defendants with passing the said note with intent to defraud the United States and Earl Roberts on or about the 23rd day of November, 1934;

The seventh count charges the three defendants with the possession of another note on or about the 30th day of November, 1934;

The eighth count charges the three defendants with the passing of the said note with intent to defraud the United States and William F. Byrnes on or about the 30th day of November, 1934;

The ninth count charges the three defendants with the possession of another note on or about the 22nd day of December, 1934;

The tenth count charges the three defendants with the passing of the same note with intent to defraud the United States and Clarence L. Smith on or about the 22nd day of December, 1934;

The eleventh count charges the three defendants with the possession of another note on or about the 18th day of February, 1935;

The twelfth count charges the three defendants with the passing of the same note with intent to defraud the United States and Dino Chelini and Gio Resoni on or about the 18th day of February, 1935;

The thirteenth count charges the three defendants with conspiracy to commit offenses against the laws of the United States, to-wit, to keep in their possession and conceal, and to pass, utter, publish and sell, and attempt to pass, utter, publish and sell, with intent to defraud the United States and other persons to the grand jurors unknown, falsely made, forged and counterfeited notes, and that thereafter one or more of said defendants, as mentioned by name, performed eight overt acts to effect the object of said conspiracy. (Tr. 2-16.)

The defendant Gaspare La Rosa pleaded guilty to all thirteen counts in the indictment, and therefore

was not on trial. (Tr. 18.) Counts three, four, seven, eight, eleven and twelve were ordered dismissed by the Court as against the appellant Salvatore Maugeri and defendant Pasqua upon motion of the United States Attorney. Counts one, two, five, six, nine and ten, along with count thirteen, the conspiracy count, were submitted to the jury as against the appellant Salvatore Maugeri and defendant Pasqua. Defendant Pasqua was found guilty on counts one, two, five, six, nine, ten and thirteen, being all the counts submitted to the jury. Appellant Salvatore Maugeri was found not guilty on counts one, two, five, six, nine and ten, and guilty on count thirteen, the conspiracy count.

APPELLANT'S ASSIGNMENTS OF ERROR.

Appellant assigns four errors as ground for his appeal:

(1) The trial Court erred in refusing to grant timely motions of the appellant to strike from the record the testimony of each of the twenty-four witnesses for the prosecution on the grounds that it was incompetent, irrelevant and immaterial and hearsay as to appellant, and upon the further ground that no conspiracy had been proven in said action as against the appellant;

(2) The trial Court erred in refusing to grant the motion for a directed verdict of not guilty made at the conclusion of the government's case, thereby allowing the case against appellant to go to the jury;

(3) The trial Court erred in refusing to grant the motion of appellant for a directed verdict of "not guilty" at the conclusion of the evidence in the case;

(4) The evidence is insufficient as a matter of law to support a verdict of guilty against appellant.

FACTS OF THE CASE.

It is undisputed that the defendants Jimmie Pasqua (true name Frank Scarpature), and Gaspare La Rosa, appellant's co-defendants, were engaged from September 28, 1934, up to and including December 22, 1934, in passing counterfeit bills. The record will show that in the passing of these various counterfeit bills by Pasqua and La Rosa, during the first part of this period they used a 1924 Hupmobile touring car purchased by Pasqua on the 29th day of September, 1934. (Tr. 72-74; 77-81; 73-75; 75-77.) It is further established that on and after November 18, 1934, the same two defendants used an Essex coupe automobile in the passing of counterfeit bills. (Tr. 52, 54, 55, 58.)

The facts connecting appellant with the conspiracy to pass said counterfeit bills are as follows:

On June 1, 1933, appellant purchased a second-hand Studebaker automobile which was registered in the name of one Jim Domenic, 155 Lighthouse Avenue, Santa Cruz, California. (Tr. 83, 85.) The records of the State of California Division of Registration, Department of Motor Vehicles, show the 1934

license number of this same Studebaker to be 3J-826. (Tr. 85, 86.) On September 11, 1934, the wreck of the Studebaker mentioned was taken out of the ocean near Santa Cruz and delivered to Jim Domenic at 155 Lighthouse Avenue, Santa Cruz. (Tr. 88, 89.) The record further shows appellant to be the owner of these premises and Domenic as tenant. (Tr. 87.) On November 18, 1934, the Studebaker was hauled away from the premises at 155 Lighthouse Avenue by a garage man, at which time the license plate was missing from the automobile. (Tr. 88-89.) On November 17, 1934, the appellant, together with his co-defendant Jimmie Pasqua, drove an Essex coupe automobile into an auto repair shop of one Al Logan in San Francisco. The Essex car was repaired on order of the appellant. Appellant paid the repair bills. Appellant said Pasqua wanted to drive the car to Los Angeles. (Tr. 94-97.) On November 18, 1934, this same Essex coupe operated by defendants Pasqua and La Rosa, and identified as such, was used in passing a counterfeit $10 bill. (Tr. 52-54.) At this time the license plate on the Essex coupe was 3J-826, the same license number which had theretofore been on the Studebaker which was wrecked and which had been purchased by appellant and registered in the name of Jim Domenic. (Tr. 52-54.) On November 23, 1934, the same Essex coupe, operated by defendants Pasqua and La Rosa, was used in the passing of another counterfeit $10 bill, the same license number, 3J-826, being on the car at this time. (Tr. 55-58, 90-94.) On November 30, 1934, the Essex coupe having been left at a service station in San Mateo

County, did not bear license number 3J-826, but a different 1934 license plate which had been issued to a man named Larkin. (Tr. 99-100, 101-106.) On November 30, 1934, appellant, in company with defendant La Rosa, purchased an automobile tire in San Francisco, for which he paid. (Tr. 97, 98.) Appellant placed the tire in his own automobile, a Studebaker sedan, and delivered it to the service station in San Mateo County where the Essex coupe had been left two days before by Pasqua and La Rosa, and where the tire so delivered by appellant was placed on the Essex coupe by the attendant at the service station. Appellant arrived at the service station at 2:00 o'clock in the afternoon and remained in and around the station until dusk. La Rosa then drove the Essex coupe to San Francisco, followed by appellant in his Studebaker sedan. Appellant stopped enroute no less than three times for periods of approximately five minutes each to look back over the route over which he had come, after which he would again catch up with La Rosa in the Essex. (Tr. 101-106.) Subsequent to this time the same Essex coupe was returned to the shop of Al Logan for further repairs, appellant again paying the repair bill. (Tr. 94-97.) And if any further evidence were needed as to appellant's ownership and operation of this Essex coupe it is found in the testimony of defendant Pasqua at the trial, as follows:

> "The only thing I had to do with the Essex was once when Maugeri asked me to bring it up from San Mateo for him, and another time when he asked me to take it down to the ferry." (Tr. 123.)

On the very day appellant and defendant La Rosa returned from San Mateo County, La Rosa driving the Essex, he, La Rosa, passed a $10 counterfeit bill on William Byrnes at 260 Octavia Street, San Francisco. (Tr. 59-60.)

Regarding the participation of the appellant in the unlawful activities of his co-defendants, the following is pertinent: The Hupmobile automobile heretofore mentioned was purchased by defendant Pasqua on the 29th day of September, 1934. Immediately thereafter and on the same day the defendants Pasqua and La Rosa, using the same Hupmobile automobile, attempted to pass a $10 counterfeit bill on Ellsworth Ramos, who reported the name and number of the car, together with a description of the two defendants, to the police authorities in the City of Berkeley. (Tr. 77-81.) This same car was used by defendants Pasqua and La Rosa in the passing of counterfeit bills on September 30, 1934 (Tr. 73-75), and on October 2, 1934 (Tr. 75-77), and was found abandoned on October 4, 1934 (Tr. 81-83), only six days after its purchase, obviously because the operators of it were aware that the alarm had gone out and that it was no longer safe to use that car. Shortly thereafter and on November 17, 1934, the Essex coupe makes its appearance on the scene and appellant arranges and pays for putting it into running order. On the said Essex coupe when used in the passing of counterfeit bills the license plate from the old Studebaker automobile purchased by the appellant appears. Later we find appellant purchasing and paying for a tire for this car, which had already been used by his co-

defendant in the passing of counterfeit money, and having the tire placed on said Essex automobile.

Thereupon, in secrecy and stealth, this car is brought to San Francisco by one of appellant's co-defendants, appellant covering the approach in the rear in his own Studebaker sedan—obviously acting as lookout. It will be noted that prior to these transactions the parties had been unsuccessful in their attempt to pass at least one bill. They were naturally apprehensive that they might be already sought by officers of the law. It will be further observed that on that very same day another counterfeit bill was passed in San Francisco by one of appellant's co-defendants, Gaspare La Rosa. (Tr. 59-60.) Appellant and his co-defendants during all this time were constantly together, either in one or the other's automobile, or on foot, and Pasqua and La Rosa had been sent into one service station where they passed a counterfeit bill, to obtain a rate on gas at appellant's request. (Tr. 68.)

ARGUMENT.

Appellant assigns as error upon the part of the trial Court the refusal to grant motions of appellant to strike from the record the testimony of each of the twenty-four witnesses for the prosecution upon the grounds that it was incompetent, irrelevant and immaterial and hearsay as to appellant, and upon the further ground that no conspiracy had been proven in said action as against appellant. It will be remem-

bered that six of the counts contained in the indictment were dismissed by the Court upon motion of the United States Attorney, and appellant was found not guilty on the remaining counts charging substantive offenses. We are concerned then solely with the conspiracy count upon which appellant stands convicted. It is, of course, well settled that the offense of conspiracy to commit a crime is separate and distinct from the crime that may be its object.

Gerson v. U. S., 25 F. (2d) 49 (U. S. C. C. A. Okla. 1928);

O'Brien v. U. S., 51 F. (2d) (U. S. C. C. A. Ind. 1931);

Rivera v. U. S., 57 F. (2d) 816 (U. S. C. C. A. Porto Rico 1932);

Telman v. U. S., 67 F. (2d) 716 (U. S. C. C. A. New Mexico 1933);

Curtis v. U. S., 67 F. (2d) 943 (U. S. C. C. A. Col. 1933).

Appellant contends, however, that the submisssion to the jury of the counts which charged substantive offenses upon which appellant was found guiltless, in all human likelihood caused prejudice in the minds of the jurors to such an extent that appellant's liberty became the sacrifice under the conspiracy charge. This same point was made in the case of *Rivera v. U. S.,* 57 F. (2d) 816, 820, First Circuit, in which case the Court said:

> "The defendants contend that, as the jury acquitted them under Count 2 of the Indictment, which alleged the substantive offense of facilitating the transportation of contraband liquor, the

> verdict of guilty of conspiracy to commit a like offense is inconsistent and an absurdity. The answer to this contention is that conspiracy to commit an offense and the substantive offense are two separate and distinct criminal acts (Williamson v. U. S., 207 U. S. 455), and it is not essential that the substantive offense be consummated. The conspiracy is none the less punishable. Acquittal of the substantive offense is not res adjudicata in a trial for conspiracy to commit it. (Coy v. United States, 5 Fed. (2) 309; Heike v. United States, 227 U. S. 131."

Appellant further raises the point that the verdict is inconsistent in that it establishes, by the acquittal on the substantive counts, that appellant did not aid, abet, accede to or participate in any way in the possession and passing of the notes. This, it is contended by the appellant, involves a finding that appellant had no knowledge that the notes were possessed or passed, and yet he is held to have conspired to do these things. Upon this point the United States Supreme Court, in the case of *Dunn v. U. S.,* 284 U. S. 390 (a case which arose in this District), said:

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment. Latham v. The Queen, 5 Best and Smith 635, 642, 643; Selvester v. United States, 170 U. S. 262. If separate indictment had been presented against the defendants for possession and for maintenance of a nuisance and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res adjudicata of the other. Where the offenses are

> separately charged in the counts of a single indictment the same rule must hold."

Appellant further complains of the admission by the trial Court of testimony relative to the possession and passing of the counterfeit notes by the defendants La Rosa and Pasqua, and assigns as error the failure of the trial Court to strike this testimony as to appellant. It is conceded by the Government that in all of the testimony relative to the possession and passing of the counterfeit bills referred to in the various counts of the indictment there is no mention made of appellant. The Government did not prove the possession or passing of any counterfeit bills by appellant personally. But the Government did prove the participation of appellant in the possession and passing of the same.

However, if there was error on the part of the trial Court (which is not conceded), in the failure to strike the testimony of the various witnesses as against the appellant on the substantive counts, the error, if any, was cured by the verdict of not guilty as to the appellant on the substantive counts. Moreover, the testimony, considering the wide latitude permitted in the introduction of evidence in conspiracy cases, was certainly properly admissible against appellant on the conspiracy count.

As was said in the case of *Lew Moy v. United States,* 237 Fed. 51:

> "The acts and statements of one co-conspirator done or entered in facilitating the purpose of the conspiracy are admissible against others. It is

not necessary that each conspirator participate in each step or stage of the common general design. One of them may do one thing, another, another. Some may take major parts while the participation of others may be in a minor degree."

Also see *Remus v. U. S.*, 291 F. 513 at 517, in which the Court said:

"A great number of assignments of error are directed to the admission of evidence. It is unnecessary to discuss these assignments in detail. They are all based upon the theory that the evidence offered over the objection of the defendant was incompetent and irrelevant to prove the material elements of the offense charged. This information charges these defendants with a joint unlawful enterprise. Any evidence tending to prove the activities and cooperation of these defendants in the commission of the offense charged was admissible.

"All the evidence offered by the government and admitted over the objection of the defendants tended to prove the connection and participation of one or more of the defendants in the commission of the offense charged. It is claimed however that these defendants could not all have been guilty of maintaining a nuisance because they were not all in possession and control of the premises. This position is not tenable. Two or more individuals may join in the maintenance of a nuisance of this character upon premises owned, occupied, and controlled by one of them. If the proof shows that each contributed property, money or service necessary to the commis-

> sion of the offense * * * all may be equally guilty as principals."

That the act of one conspirator in furtherance of the common design is the act of all was also held in the case of *Olmstead v. U. S.,* 5 F. (2d) 712 (Ninth Circuit), and *Coates v. U. S.,* 59 F. (2) 173 (Ninth Circuit).

The above rule is too well established to require any further reference to the decided cases. From this it follows that if the conspiracy was established as against appellant, the testimony of the Government's witnesses was properly admissible.

Appellant further complains that there is no evidence that he at any time committed an unlawful act. No better answer to this can be found than in the case of *Heskett v. U. S.,* 58 F. (2d) 897 (Ninth Circuit), in which case this Court said:

> "There is no rule of law that requires an overt act to be an unlawful one. It may be in itself a perfectly lawful act which becomes unlawful only when it is committed in pursuance of and to effect the objects of the conspiracy. Houston v. United States, 217 Fed. 842; United States v. Supperman, 215 Fed. 135; U. S. v. Shevlin, 212 Fed. 343."

We come to appellant's assignment of error on the part of the trial Court, based on its failure to grant the motion of appellant for a directed verdict of not guilty at the conclusion of the Government's case, and at the conclusion of all the evidence in the case. The answer to appellant's assignment on this point may

be found in cases decided in our own Circuit. In the case of *U. S. v. Lesher,* 59 F. (2d) 53 (Ninth Circuit), the Court, speaking through Mr. Justice Neterer, said:

> "The sole issue is alleged error in overruling defendant's motion for a directed verdict. This case, like all like cases, has its difficulties. The court does not weigh the evidence, but considers whether there is any or sufficient evidence to sustain a verdict. See Ford v. United States (C. C. A.), 44 F. (2d) 754. The trial judge must, in the exercise of sound discretion, determine whether upon the evidence produced a verdict can be sustained, not weigh the evidence; if there is evidence, it must be submitted; if not, it is pronouncedly his duty to direct a verdict."

To this same effect is the case of *Vilson v. United States,* 61 F. (2d) 901 (Ninth Circuit). In the *Vilson* case the facts were as follows: A conviction had been secured on three counts: (a) unlawful possession of intoxicating liquors; (b) unlawful manufacture of intoxicating liquors; and (c) unlawful possession of a still and equipment designed for the manufacture of intoxicating liquors.

A still was found in a shed or garage on premises consisting of a house, barn and shed or garage, and also a small garden on the Marquam Road. The premises had been under surveillance for sometime by Government agents who were reliably informed that a still was being operated on these premises. May 26th they saw the defendant working around in the garden patch, and on a number of subsequent occa-

sions the agents saw the defendant driving in or out of the premises, talking to various persons. On one occasion they saw the defendant drive up to the house in a Ford coupe, enter the house and shortly thereafter return to the car in front of the house carrying a ten-gallon keg, which he put in the car and drove away. On June 2nd the agents, with a deputy sheriff, went to the vicinity of the premises and "waited in the woods". They saw defendant and another person drive up in the same Ford coupe. Defendant opened the gate and the car was driven in and the parties were joined by a co-defendant, one Caesar. The search warrant was then executed. A 60-gallon still and vats full of mash were found. The Court, speaking through Mr. Justice Neterer, said:

> "The issue on appeal was presented on denial of a motion for a directed verdict. The record not only shows there is substantial evidence to sustain the charges but tended to show that defendant aided and abetted others in the offenses on which defendant is convicted, and that defendant engaged with others in a common conspiracy to do such acts, and in either case each of the parties so engaged is guilty of the offenses in issue."
>
> *Samich v. United States,* 22 F. (2d) at page 573;
>
> *Shively v. United States,* 299 F. 710.

In considering the evidence on a motion for a directed verdict the evidence must be considered in its most favorable aspect to the appellee.

U. S. v. Scarborough, 57 F. (2d) 137;

Knable v. U. S., 9 F. (2d) 567;

Benton v. U. S., 202 F. 344;
Kelly v. U. S., 258 F. 392.

If there is substantial evidence it must be submitted to the jury, whose function it is to consider and weigh it, and this includes credibility of witnesses.

Montana Tonopah Mining Co. v. Dunlap, 196 F. 612;
U. S. v. Lesher, 59 F. (2d) 53;
Toledo St. L. & Wr. Co. v. Howe, 191 F. 776;
Enstrom v. De Witt, 58 F. (2d) 137;
Woodward v. Atlantic Coast Line R. R., 57 F. (2d) 1019.

Appellant's fourth assignment of error is that the evidence is insufficient as a matter of law to support a verdict of guilty against defendant. In support of this point appellant leans heavily upon the cases of *Sugarman et al. v. U. S.,* 37 F. (2d) 663 at page 665; *Chin Wan et al. v. U. S.,* 35 F. (2d) 667, and *Haning v. U. S.,* 21 F. (2d) 508, 509.

The first two cases mentioned were decided in this Circuit and the *Haning* case in the Eighth Circuit. Appellant further cites a number of cases, all more or less stating the rule that when all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse a judgment of guilt.

It will be noted, however, that in all of the cases cited to this effect the evidence, if any, as to the guilt of the various defendants was very meagre, and leaned far more to the side of innocence than to guilt. The facts set out in the two cases decided in this Cir-

cuit, the *Sugarman* case and the *Chin Wan* case, forcibly bear out this point. As stated by the Court in the *Sugarman* case:

> "It will thus be seen that the only competent testimony tending to connect the appellant Williams with the commission of the offense was the company he was found in, the giving of an assumed name at the time of his arrest, and the unexplained possession of a coat comparing in texture with a pair of pants found in an abandoned boat."

And in the *Chin Wan* case, as stated by Mr. Justice Wilbur:

> "As to appellant Lett the case is entirely different. His only connection with the transaction involved in this appeal was as set forth above. It was not shown that he had any knowledge of the contents of the box transported by him, or of the criminal purposes of the other parties. He simply drove the automobile containing the box to the express office at the request of the witness Rosa, aided him to remove the box from the automobile, told him to do as instructed and refused to wait for him at the express office when requested to do so."

In the *Haning* case there was even less evidence from which to infer guilt.

The rule is well established that circumstantial evidence may establish guilt in conspiracy cases. Circumstantial evidence was well defined in the case of

> *Rumley et al. v. U. S.*, 293 F. (2d) 532 at 551 (C. C. A. 2d),

as follows:

> "Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. It is legal evidence and a jury must act upon it as if it were direct when it is satisfactory beyond a reasonable doubt."

Also see the case of

Ferris v. U. S., 40 F. (2d) 837,

in which the question of the sufficiency of the evidence to prove the charge of unlawful transportation of whisky and gin and for conspiracy to so transport was raised. The facts there involved were briefly as follows:

About 8 o'clock on the morning of March 6, 1929, the sheriff of Sonoma County, with one of his deputies, stopped a green painted auto truck driven by the defendants Sanchez and Wilson. The truck was found to contain a quantity of gin and whisky. Within a space of time estimated to be two or three minutes following the arrest of Sanchez and Wilson a blue sedan automobile was observed approaching. In the sedan were the two appellants Ferris and Marino. Upon being stopped Ferris gave his name as Williams, and Marino that of Mays. Ferris was carrying a 38 Colt revolver. Upon the floor of the car was found a Thompson machine gun. Upon being questioned Ferris said the guns were for hijackers. Marino stated they were hunting quail. Also found in the car was a coil of rope with green paint on it of the same color as the green truck. All the defend-

ants wore the same kind of pants. Ferris said to the sheriff: "I thought the officers in this county were all right to come through here." The foregoing was substantially all the evidence offered against the appellants. The Court, speaking through Mr. Justice Norcross, in discussing the facts, said:

> "Where, as in this case, circumstantial evidence is relied upon to support a verdict of guilt, all the circumstances so relied upon must be consistent with each other, consistent with the hypothesis of guilt, and inconsistent with every reasonable hypothesis of innocence. *It does not not follow, however, from this statement of the rule, that the admission in evidence of certain circumstances which may also be consistent with innocence is determinate of the question of the sufficiency of the evidence unless such circumstances are essential to the government's case.*
>
> "Taken alone, the giving of assumed names and the character of clothing worn by the several defendants might be regarded only as suspicious circumstances, insufficient in themselves to support a conviction. (Citing Sugarman et al. v. U. S.)"

But, taking all the circumstances into consideration, the Court held that there was presented a case consistent with guilt and wholly inconsistent with any reasonable hypothesis of innocence.

Appellant claims that as to him there is at most only suspicions that he participated in or had knowledge of the unlawful acts of his co-defendants La Rosa and Pasqua. In reply to this it is respectfully submitted that taking into consideration all the facts

of the case as a whole, there is only one logical conclusion to be drawn therefrom, and that is the conclusion that was drawn by the trial jury, viz.: that the defendant is guilty of the crime charged.

It is admitted by appellee that the facts in this case appear complicated. But when once assembled they are simple and overwhelmingly tend to a most positive degree to establish appellant's guilt. A brief resumé of the formidable array of facts as established by the Government will so prove.

1. As a result of being forced to abandon the Hupmobile car used in their unlawful activities the defendants Pasqua and La Rosa were faced with the need of obtaining a different vehicle which must of necessity be cheap so that in its turn it also could be abandoned in the event, as in the first instance, the chase should become too hot.

2. As a result of this necessity we next find defendant Pasqua, in company with the appellant, preparing a somewhat dilapidated Essex coupe for action in the repair shop of Al Logan in San Francisco.

3. Appellant paid for the work of putting this vehicle into commission.

4. Appellant gave as the ostensible reason for having the car repaired that Pasqua wanted to drive it to Los Angeles.

5. That immediately thereafter, on November 18, 1934, defendants Pasqua and La Rosa in this same Essex coupe automobile, attempted to pass a $10 counterfeit bill on Charles Blach, service station operator at El Cerrito, California.

6. The license number on the Essex coupe at this time is 3J-826. *This same license number was formerly on an old Studebaker car purchased by appellant Maugeri on June 1, 1933,* and wrecked on or about September 11, 1934.

7. On the 23rd day of November, 1934, this same Essex coupe bearing license number 3J-826 was used in passing a $10 counterfeit bill on Earl Roberts, service station operator at 18th Street and Potrero Avenue in San Francisco.

8. A short time after November 18, 1934, appellant stated to Al Logan that the Essex coupe which had been repaired by Logan had burned out a bearing and that he would bring the car in.

9. Shortly thereafter appellant Maugeri did bring in the Essex coupe to Al Logan and after having it repaired paid for the work.

10. On the 28th day of November, 1934, La Rosa and Pasqua, driving the Essex coupe, left the same with Jules A. Zimmerlin, service station operator at Ninth Avenue and Bayshore Highway in San Mateo County, because it was disabled on account of a blownout tire.

11. When the Essex coupe was in Zimmerlin's service station *it did not have license number 3J-826 it, but another license number which had been issued to a man named Larkin.* Obviously, the change of license plates had been made subsequent to November 23, 1934, as the defendants apparently suspected that the license plate which they had theretofore

been using might by this time be under investigation by the officers.

12. On November 30, 1934, defendant La Rosa and appellant left appellant's home in a *Buick roadster owned by defendant Pasqua,* and drove to the La Salle Restaurant in San Francisco, where they remained but a short time. Upon leaving the restaurant they drove away in *appellant's Studebaker sedan* (not the Studebaker that was wrecked), leaving Pasqua's Buick parked near the La Salle Restaurant.

13. Immediately afterwards appellant purchased and paid for a tire in San Francisco.

14. Immediately after this purchase appellant and La Rosa proceeded in appellant's Studebaker sedan to the service station of Jules Zimmerlin, where they had said tire placed upon the Essex coupe which had been left there by La Rosa and Pasqua two days previous.

15. Appellant and La Rosa arrived at this service station at 2 o'clock in the afternoon. The tire was taken by appellant from his Studebaker sedan and placed on the Essex coupe by the attendant at the service station. They remained in and around the service station until dusk.

16. La Rosa then proceeded in the direction of San Francisco in the Essex at a speed of approximately 12 miles an hour.

17. Appellant remained seated at the wheel of his Studebaker sedan for approximately 10 minutes after La Rosa left. He then followed La Rosa, catching up to him shortly.

18. La Rosa, in the Essex, turned west at the intersection which connects with San Bruno and the Bayshore Highway. At this point appellant drove his car to the right side of the Bayshore Highway headed north and stopped. Shortly thereafter appellant followed over the same road as the Essex.

19. Half way between the Bayshore Highway and the Southern Pacific Railroad track appellant stopped for approximately five minutes, looking back toward the Bayshore Highway over which he had just come. Appellant then proceeded to the El Camino Highway, where he turned north and caught up with the Essex by the Tanforan Track.

20. Appellant at this point drove his car to the side of the highway and stopped there approximately five minutes, following which he again followed the Essex to the intersection of 19th Avenue and Sloat Boulevard in San Francisco, where both cars stopped and appellant and La Rosa talked for sometime.

21. On December 8, 1934, appellant and Pasqua were seen leaving the La Salle Restaurant in Pasqua's Buick roadster, the same Buick appellant and La Rosa had started out in on the 28th day of November, appellant and Pasqua at this time being followed to Al Logan's repair shop, where the Essex coupe was again seen. When they left Logan's shop Pasqua drove away in the Essex and appellant in the Buick.

22. On April 8, 1935, La Rosa was arrested riding in this same Essex coupe, at which time the tire theretofore purchased by appellant was taken off the Essex.

We submit that the foregoing items of evidence tend forcibly to show that appellant was actively engaged with his co-defendants in passing counterfeit bills. He furnished the mode of transportation used by them, to-wit: the Essex coupe, having it placed in working order at his own expense. The license plate which was used upon that vehicle until its use became too dangerous is directly traced to a car which had formerly been bought by the appellant. When the Essex coupe blew out a tire it was appellant who purchased and paid for a new tire and who transported his co-defendant La Rosa to San Mateo County for the purpose of having the tire placed upon the Essex coupe. Thereafter, under cover of darkness appellant, in his own car, covers the journey of La Rosa in the rear to San Francisco, La Rosa driving the Essex coupe upon which the license plates had been changed, obviously for protection from officers of the law. Appellant repeatedly stopped on the way, a known device of lawbreakers to detect any pursuing automobile. In no other way can the actions of appellant at this time be explained.

It is, of course, indisputable that the foregoing acts of appellant which were proved by the Government, if done with knowledge of the criminal activities in connection with the use of the Essex automobile, would be ample to establish that appellant was a party to the conspiracy. The contention of appellant in the final analysis is that there is no evidence from which such knowledge on his part could reasonably be inferred. Being a mental state, of course, it is not always possible to produce direct evidence of

knowledge or intent. As well stated by the Circuit Court of Appeals for the Second Circuit in the case of

Coltabellota v. U. S., 45 F. (2d) 117:

"Being nothing more tangible than a state of mind the defendant's intent must of necessity remain his secret except only in so far as he disclosed it by speech or conduct. Although he denied any part in her going away and attempted to prove an alibi, the jury had the right to disbelieve him and his evidence and take the facts as disclosed by the government's evidence to be true. It had an equal right to make all reasonable deductions from the facts proved to determine his intent."

"That this element of an offense may be implied from established facts is beyond dispute."

Wuichet v. U. S., 8 Fed. (2d) 561-562 (C. C. A. 6th).

The narrow question then is whether there was in the foregoing facts any reasonable basis for the inference drawn by the jury that those acts of the appellant were performed with knowledge of the unlawful enterprise. Obviously the acts tended to further the conspiracy, so that knowledge and intent are the only elements necessary to be considered here. Do not the foregoing facts give rise to a reasonable inference that appellant had knowledge of the unlawful activities of his two co-defendants, in which activities the Essex automobile was used?

Clearly, all the actions of the appellant in preparing, equipping and paying for the work and equipment on the Essex strongly indicated that Pasqua

and La Rosa were merely his agents in operating that automobile in *some* sort of an enterprise. As will be observed from the evidence, apparently the only enterprise in which the Essex automobile was used by Pasqua and La Rosa was the enterprise of passing the counterfeit bills mentioned in the indictment. In that unlawful enterprise, of course, the matter of concealment was of primary importance. Does not the fact that the parties at first used on this vehicle a license plate which did not belong to the vehicle, but which had in fact been taken from another vehicle which appellant had purchased some time previously, tend to prove that he was fully cognizant of the unlawful use to which the Essex automobile was to be put? When this factor is viewed with the appellant's actions in financing the preparation, equipment and repairing of the vehicle during all the period of its use in this unlawful enterprise, and with his actions and conduct in connection with its conveyance from San Mateo to San Francisco on the evening of November 30, 1934, certainly it would be too much for the Court to say that the jury could not reasonably infer from all the evidence that the appellant participated with knowledge in the unlawful enterprise. At the risk of possible undue repetition, we desire to stress the point that all of the actions taken and payments made by appellant in connection with the Essex automobile throughout that period show conclusively that he was the principal in some use to which it was being put, and that the defendants Pasqua and La Rosa were his agents. Certainly it is not a reasonable hypothesis that he not only paid for

putting the car into commission, but thereafter paid for other repairs and personally purchased and took to San Mateo a tire for the vehicle purely out of friendship or altruism in behalf of his two co-defendants! From all the evidence could the jury have arrived at any other conclusion than that appellant was promoting the activities of his co-defendants by his financing and personal aid in connection with the Essex automobile, that the activities which he was so promoting by those acts were the unlawful activities charged in the indictment, and that he did so knowingly and intentionally?

CONCLUSION.

In view of these facts it is submitted that appellant is taxing the credulity of this Court too far when he insists there is at most but a series of suspicious circumstances in connection with his proven activities in the criminal acts of his co-defendants La Rosa and Pasqua.

We submit that appellant has shown no error and that judgment should be affirmed.

Dated, San Francisco,
October 18, 1935.

H. H. McPIKE,
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ROBERT L. McWILLIAMS,
Assistant United States Attorney,
V. C. HAMMACK,
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Attorneys for Appellee.

No. 7908

United States

Circuit Court of Appeals

For the Ninth Circuit.

CLAUDE EMERSON DuVALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the District of Arizona.

C-7287 Tucson

Viol: 26 USC 696.
(Issuing prescriptions for narcotic drug not in pursuance of written order form).

United States of America,
District of Arizona—ss.

In the District Court of the United States in and for the District of Arizona, at the November term thereof, A. D. 1934.

The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present, that Claude Emerson DuVall, on or about the 26th day of March, A. D. 1935, and within the said District

*Page numbering appearing at the foot of page of original certified Transcript of Record.

of Arizona, being then and there a practicing physician, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away certain derivatives and salts of opium, to-wit, 4 grains of morphine sulphate to one Pat Rooney, alias Fred Humphry, not in pursuance of a written order from said Pat Rooney alias Fred Humphry on a form issued in blank for that purpose by the Commissioner of Internal Revenue under the provisions of the Act of Congress of December 17, 1914, as amended, in the manner following, to-wit, that the said Claude Emerson DuVall, at the time and place aforesaid, did issue and dispense to the said Pat Rooney, alias Fred Humphry, a certain prescription for said 4 grains of morphine sulphate, the said prescription being then and there signed by the said defendant, and that the said Pat Rooney, alias Fred Humphry was not then and there a patient of the said Claude Emerson DuVall, and the said morphine sulphate was dispensed and distributed by the said Claude Emerson DuVall not in the course of his professional practice only; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT: And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Claude Emerson DuVall, on or about the 26th day of March, A. D. 1935, and within the said District of Arizona, being then and there a practicing physician, did unlawfully, [4] wilfully, knowingly

and feloniously sell, barter, exchange and give away certain derivatives and salts of opium, to-wit, 3 grains of morphine sulphate to one Pat Rooney, alias Fred Humphry, not in pursuance of a written order from said Pat Rooney alias Fred Humphry on a form issued in blank for that purpose by the Commissioner of Internal Revenue under the provisions of the Act of Congress of December 17, 1914, as amended, in the manner following, to-wit, that the said Claude Emerson DuVall, at the time and place aforesaid, did issue and dispense to the said Pat Rooney, alias Fred Humphry, a certain prescription for said 3 grains of morphine sulphate, the said prescription being then and there signed by the said defendant, and that the said Pat Rooney, alias Fred Humphry was not then and there a patient of the said Claude Emerson DuVall, and the said morphine sulphate was dispensed and distributed by the said Claude Emerson DuVall not in the course of his professional practice only; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN,
United States Attorney for the
District of Arizona.
K. BERRY PETERSON,
Assistant. [5]

C.....

IN THE DISTRICT COURT OF THE
UNITED STATES
for the District of Arizona

UNITED STATES OF AMERICA

vs.

.....

INDICTMENT

A TRUE BILL

Geo Jay
Foreman of the Grand Jury

Witness examined before the Grand Jury:

.....

.....

.....

Presented to the Court in the presence of the Grand Jury by their Foreman, and filed this..... day of....., A. D. 193.....

.....,
Clerk.

[Endorsed]: Filed May 2, 1935. [6]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

COMES NOW the defendant, Claude Emerson DuVall, who appeals in the above entitled action, by and through his attorney hereinafter named, and files and presents to the Court his Assignment of Errors whereby said defendant assigns as error in the record and proceedings of the above entitled Court in the above entitled action the following errors, to-wit:

I.

That the court erred in overruling the general and special demurrers to the indictment for the following reasons:

(a) Neither of the counts of the indictment states facts sufficient to constitute an offense under the laws of the United States of America.

(b) Neither of the counts of the indictment charges the defendant with a violation of Sec. 696, Title 26, USCA, or the act of Congress of December 17, 1914, or the amendments thereto, known as the Harrison Narcotic Act.

(c) That if the offenses charged in the indictment fall within the Harrison Narcotic Act, then the Act is void in that it exceeds the power conferred upon the Congress by the Constitution of the United States.

(d) Neither of the counts of the indictment charges that the defendant, sold, bartered, exchanged and gave away morphine sulphate to said Pat Rooney, alias Fred Humphry, in that each of said

counts wholly omits and fails to charge that [7] said Pat Rooney, alias Fred Humphry, ever did obtain the narcotic drug, or any part thereof, upon said prescriptions, or that said prescriptions were ever filled.

II.

The Court erred in permitting counsel for the Government to propound to Dr. S. D. Townsend, a witness called to testify on behalf of the Government, and to permit said witness to answer in the negative, the following hypothetical question, to-wit:

> "Now, Doctor, assuming that a narcotic drug addict should apply to a practicing physician for a prescription for narcotic drugs and at the time of such application the physician had knowledge that such applicant was addicted to the use of morphine, and assuming that said applicant was not suffering from any incurable disease, and assuming that without any physical examination except placing a stethoscope on the chest of the applicant and to feel his pulse, not even removing his clothes, such physician should write and deliver to such applicant a prescription calling for 8 half-grain morphine sulphate tablets with no endorsement on such prescription that the said applicant was suffering from any incurable disease except the endorsement 'Article 85, Exception 1', and no direction on said prescription as to the dosage of said morphine except 'Use as directed for relief of pain', and assuming that some several hours later on that same day the said applicant

should again call upon said physician for another prescription for narcotic drugs and that without any physical examination of such applicant and knowing that the said applicant was then and there a drug addict, said physician should again write and deliver to said applicant a prescription calling for 6 half-grain morphine sulphate tablets with no endorsement on such prescription that this applicant was suffering from any incurable disease except the endorsement 'Article 85, Exception 1' and no direction on said prescription as to the dosage of such morphine except 'Use as needed for [8] relief of pain'. Assuming further that the morphine so prescribed was to come into such applicant's possession to administer at such time and in such quantities as he desired to use it, state whether in your opinion such prescriptions were issued in good faith in the course of the professional practice only of such physician."

That by permitting the foregoing question to be propounded, and by permitting the witness to answer it in the negative, the Court erred as follows, to-wit:

(a) That said hypothetical question is in part essentially predicated upon Article 85, Exceptions 1 & 2, of Regulations Number 5, promulgated on January 1, 1928 by the Commissioner of Internal Revenue with the approval of the Secretary of the

Treasury; that said Article and Exceptions are contrary to the prohibitions of the Harrison Narcotic Act in so far as it applies to physicians, and are beyond the regulatory power conferred by said act upon the Secretary of the Treasury and the Commission of Internal Revenue in so far as they apply to this defendant.

(b) That if the Harrison Narcotic Act confers upon the foregoing executive officers power thus to regulate physicians registered under the act, then it is an unwarranted and unconstitutional delegation of power.

(c) That said Article and Exceptions are an unlawful attempt by executive officers of the Government to legislate upon matters solely conferred upon Congress by the Federal Constitution.

(d) That the regulations prescribed by said Article and Exceptions attempt to exert a power in its application to this defendant which is reserved to the several states.

(e) That the Harrison Narcotic Act does not limit a physician registered under the act to the prescribing of morphine sulphate to persons afflicted only with incurable diseases. [9]

III.

The Court erred in denying the motion of the defendant, at the close of the Government's case in chief, and at the close of the whole case, to instruct the jury to return a verdict of acquittal upon the following grounds, to-wit:

(a) That there is a fatal variance between the proof and the indictment in that the proof discloses that the sale of the narcotic drug by the defendant was made to Government Narcotic Agent, C. V. B. Moore, and not to Pat Rooney, alias Fred Humphry, as charged in both counts of the indictment.

IV.

The Court erred in giving the following instruction during the course of its charge to the jury, to-wit:

> "The Harrison Narcotic Act further provides: 'The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of the Act into effect.' Such rules and regulations were duly promulgated, as required by the Act, and among other provisions of the regulations now in force and effect is the following: Article 85, which reads as follows: 'A prescription in order to be effective in legalizing the possession of unstamped narcotic products and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the Act.'"

"Now, there are certain exceptions to the rule, set forth as follows: 'Exceptions to this rule may be properly recognized, (1), in the treatment of incurable disease, such as cancer, advanced tuberculosis, and other diseases well [10] recognized as coming within this class, where a physician directly in charge of a bona fide patient suffering from such disease prescribes for such patient, in the course of his professional practice and strictly for legitimate medical purposes, and in so prescribing endorses upon the prescription that the drug is dispensed in the treatment of an incurable disease; or if he prefers, he may endorse upon the prescription 'Exception (1) Article 85'. (2) A physician may prescribe for an aged or infirm addict whose collapse would result from the withdrawal of the drug, provided he endorse upon the prescription that the patient is aged and infirm, giving age, or if he prefers he may endorse upon the prescription, 'Exception (2) Article 85'."

"Now Gentlemen, you are instructed that the phrases 'to a patient' and 'in the course of his professional practice only' as used in the statute and rules and regulations which have been read to you, are intended to confine the immunity of the registered physician in dispensing narcotic drugs strictly within the bounds of the physician's professional practice and not to extend it to sale by such physician intended to cater

to the appetite or satisfy the cravings of one addicted to the drug only. A prescription issued for either of the latter purposes protects neither the physician who knowingly issues it nor the dealer who knowingly accepts and fills it."

"The statute does not prescribe the disease for which morphine may be supplied. Regulation 85 in its provisions forbids the giving of a prescription to an addict or habitual user of narcotics not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute nor the regulations precludes a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards."[11]

The foregoing instruction is erroneous and prejudicial for the following reasons, to-wit:

(a) That said instruction is in a material part predicated upon Article 85, Exceptions 1 and 2, of the regulations promulgated with reference to the enforcement of the Harrison Narcotic Act, which Article and Exceptions are contrary to and exceed the prohibitions of said act.

(b) That said Article and Exceptions are beyond the regulatory power conferred upon the Secretary of the Treasury and the Commissioner of Internal

Revenue in so far as they apply to physicians and to this defendant.

(c) That if the Harrison Narcotic Act confers upon such executive officers authority thus to regulate physicians registered under the act, then it is unwarranted and unconstitutional delegation of power.

(d) That said Article and Exceptions constitute an unlawful attempt by executive officers of the Government to legislate upon matters solely conferred upon Congress by the Federal Constitution.

(e) That the regulations prescribed by said Article and Exceptions are an attempt to exert authority in its application to this defendant which is reserved to the several states.

(f) That the foregoing instruction is contradictory and confusing in that the court charged the jury in the language of the foregoing Article and Exceptions, both of which preclude a physician issuing a prescription to a morphine addict not suffering from an incurable disease named in Exception 1, or who is not aged and infirm as stated in Exception 2, and then charged the jury that Article 85, Exceptions 1 and 2, do not preclude a physician from prescribing for an addict an amount of morphine sufficient to relieve a condition incident to addiction.

(g) That the foregoing instruction is erroneous in [12] that it charged the jury that the Harrison Narcotic Act, and Article 85, Exceptions 1 and 2, forbade the defendant, as a physician, to prescribe morphine to the said Pat Rooney, alias Fred Hum-

phry, to satisfy the cravings resulting from his addiction to the use of morphine.

V.

The Court erred in giving the following instruction during the course of its charge to the jury, to-wit:

> "The good faith of the defendant treating the witness, Pat Rooney, as a physician, for the purpose of curing him from the narcotic habit is an important issue involved in this case. One of the objects of the Narcotic Act was no doubt intended to prevent the growing use of these narcotics deemed a menace to the nation by Congress. If a physician and the others mentioned in the exceptions could sell and dispense these narcotics regardless of the fact whether it be done in good faith for the relief of a patient, then the moral object of the Act is entirely defeated, notwithstanding the fact that it is primarily a revenue measure. It cannot be claimed that a physician selling and dispensing these narcotics through a prescription, or otherwise, not in good faith for the purpose of securing the cure of one suffering from an illness, or to cure him from the narcotic habit, is doing so in the course of his professional practice only as prescribed by the express language of the Act."

The foregoing instruction is erroneous and prejudicial for the following reasons, to-wit:

(a) That the foregoing instruction directed the attention of the jury to the moral aspect of the Harrison Narcotic Act, whereas the act must be justified, if at all, as a revenue measure in its application to the charges laid in the indictment herein.

(b) That the foregoing instruction was calculated [13] to, and it did, prejudice the jury against the defendant in that it injected into the case an issue that is unwarranted and, if warranted, was improperly limited and defined.

(c) That the foregoing instruction limited the defendant, as a physician registered under the Harrison Narcotic Act, to prescribing the narcotic drug only for curing illness and for curing the said Pat Rooney of the narcotic habit.

WHEREFORE, this appealing defendant, by reason of errors assigned aforesaid, prays the judgment and sentence imposed upon him be reversed and held for naught.

LESLIE C. HARDY,
Attorney for Defendant and Appellant.

Service of the foregoing Assignment of Errors admitted this 5th day of August, 1935.

FRANK E. FLYNN,
United States Attorney.
By K. BERRY PETERSON,
Assistant United States Attorney.

[Endorsed]: Filed Aug. 5, 1935. [14]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the 2nd day of May, 1935, the indictment was returned by the grand jury and filed herein against the defendant, and on the 12th day of June, 1935, and after the defendant had entered his plea of not guilty to both counts of the indictment, this cause came on for trial before the above entitled court and a jury, the Honorable Albert M. Sames, Judge Presiding, the United States of America appearing by its counsel, K. Berry Peterson, Esq., and John P. Dougherty, Esq., Assistant United States Attorneys, and the defendant, Claude Emerson DuVall, appearing by his counsel, Leslie C. Hardy, Esq., Clarence V. Perrin, Esq., and Milton Cohan, Esq.; that after said cause was tried and submitted to the jury, as aforesaid, the jury on the 20th day of June, 1935, reported to the court that they were unable to agree upon a verdict, and said jury was on said day discharged by the court; that on the 25th day of June, 1935, said cause again came on for trial before the above entitled court and a jury, the Honorable Albert M. Sames, Judge Presiding, and the United States of America and the defendant appearing by the same counsel; that after said indictment was returned and filed, as aforesaid, and before the defendant entered his plea of not guilty, and before the cause first came on for trial, as aforesaid, the following proceedings were had:

The defendant filed General and Special Demurrers to the indictment which recite as follows: [15]

[Title of Court and Cause.]

GENERAL AND SPECIAL DEMURRERS.

COMES NOW Claude Emerson DuVall, the above named defendant, and demurs to the indictment in the above entitled action, and as grounds therefor, shows to the Court:

GENERAL DEMURRER.

That none of the two counts contained in said indictment state facts sufficient to constitute an offense under the laws of the United States.

SPECIAL DEMURRER.

I.

That none of the counts of said indictment charge or accuse the defendant of any violation of Title 26, Sec. 696, U. S. C. A., or of any of the provisions of the Act of Congress of December 17, 1914, or the amendments thereto.

II.

That said indictment, and each of the counts thereof, are duplicitous in that they join separate offenses in each of the counts of said indictment.

III.

That said indictment, and each of the counts thereof, does not charge that said defendant sold, bartered, exchanged or gave away any of the Nar-

cotics described therein to the said Pat Rooney, alias Fred Humphry, or any other person.

IV.

That said indictment, or any of the counts thereof, does not allege that the defendant participated in the sale of the drugs described in said indictment to the said Pat Rooney, alias Fred Humphry.

V.

That the Acts of Congress, and the amendments thereto, upon which the indictment herein is found and returned, are void [16] in that they contravene the Constitution of the United States of America and are wholly beyond the power of Congress to enact in so far as said Acts of Congress pertain herein.

WHEREFORE, defendant prays that these demurrers be sustained and that the indictment herein be quashed and dismissed.

OTTO E. MYRLAND
Attorney for Defendant.

(Filed May 13, 1935)

The General and Special Demurers were overruled by the court on May 21st, 1935, and the defendant excepted.

During the presentation of the Government's case in chief, and to maintain the issues upon its part, counsel for the Government introduced in evidence, without objection, a certified copy of the license of

the defendant to practice medicine within the State of Arizona. Counsel for the Government and the defendant stipulated, before the evidence was closed, that the defendant, at the time mentioned in the indictment, was a physician registered under the provisions of the Harrison Narcotic Act and had paid the tax required by said Act.

At the time the second trial of this cause came on for hearing, and after the jury was sworn and empaneled to try the cause, and before any testimony was offered or given, the defendant again submitted and urged the foregoing General and Special Demurrers which were by the court again overruled, and the defendant excepted.

Whereupon the United States of America called

PAT ROONEY

as a witness on behalf of the government who testified in part as follows: [17]

Examination by Mr. Peterson: My name is Fred Rooney. I am sometimes known as Pat Rooney and Fred Humphry. I am 35 years old and I have been addicted to the use of morphine sulphate for 18 or 19 years. I have known the defendant, Dr. Claude Emerson DuVall, for approximately three and one-half years. When I first consulted Dr. DuVall I

(Testimony of Pat Rooney.)

told him I was afflicted with bronchial asthma. He examined me by feeling my pulse and placing a stethoscope on my chest for a few seconds. He did not remove my shirt. I have no disease that I know about, except I have been addicted to the use of morphine sulphate for 18 or 19 years having used as much as 10 or 15 grains per day. On March 26, 1935 I was confined in the city jail at Tucson. On that day at about 2:30 or 3:00 P. M. Government Narcotic Agent C. V. B. Moore gave me money and sent me to Dr. DuVall's office to purchase a prescription for morphine sulphate. Mr. Moore accompanied me to the building where Dr. DuVall's office is located and waited for me in front of the building while I secured the prescription. At that time Dr. DuVall gave me a prescription for 4 grains of morphine sulphate. Mr. Moore took me to the Sixth and Sixth Pharmacy in Tucson where I had the prescription filled, and Mr. Moore gave me the money to fill it. I received the morphine sulphate on the prescription and gave it to Mr. Moore. Government's Exhibit No. 3 which you hand me is the prescription which Dr. DuVall gave me. Said Exhibit, abstracted to the record, is as follows:

> "A prescription dated March 26, 1935 for eight one-half grains of morphine sulphate issued by Dr. C. E. DuVall to Fred Humphry and endorsed: Article 85, Section 1. Use as directed for relief of pain."

The witness Rooney continuing: On the same day at about 10:00 P. M. I went with Narcotic Agent

(Testimony of Pat Rooney.)

Moore to the home [18] of Dr. DuVall at Tucson and there received from Dr. DuVall a prescription for 3 grains of morphine sulphate. Mr. Moore waited outside while I went into Dr. DuVall's house. Mr. Moore gave me the money to pay Dr. DuVall for this prescription. Government's Exhibit No. 2 which you hand me is the prescription which Dr. DuVall wrote and gave to me at this time. Said Exhibit, abstracted to the record, is as follows:

> "A prescription dated March 26, 1935 for six one-half grains of morphine sulphate issued by Dr. C. E. DuVall to Fred Humphry and endorsed: Article 85, Section 1. Use as directed for relief of pain."

The witness Rooney continuing: After I received this prescription from Dr. DuVall, Mr. Moore took me to the Santa Rita Drug Store at Tucson where I had the prescription filled. Mr. Moore gave me the money to have the prescription filled. I received the morphine sulphate on the prescription and delivered it to Mr. Moore.

Whereupon

C. V. B. MOORE

was called as a witness on behalf of the government who testified in part as follows:

Examination by Mr. Dougherty: I am employed as a Narcotic Agent for the United States Government and have been so employed for about ten years. I have known Pat Rooney for about that length of

(Testimony of C. V. B. Moore.)

time. On March 26, 1935 I sent Pat Rooney to Dr. DuVall's office to obtain a prescription for morphine sulphate. I gave Pat Rooney the money to pay for the prescription. I waited for Pat Rooney in front of the building where Dr. DuVall's office is located. Rooney returned to me with a prescription from Mr. DuVall for 4 grains of morphine sulphate. Government's Exhibit No. 3 which you hand me is the prescription. [19] This occurred about 2:30 or 3:00 P. M. on March 26, 1935. I then took Rooney to the Sixth and Sixth Pharmacy in Tucson and gave him the money to fill the prescription. He returned from the pharmacy and gave the filled prescription to me which I kept in my possession in the narcotic safe at Phoenix until it was introduced in evidence at this trial. On March 26, 1935 at about 10:00 P. M., I took Pat Rooney to Dr. DuVall's residence at Tucson and gave him money to secure a prescription from Dr. DuVall for morphine sulphate. I remained outside and Pat Rooney went into Dr. DuVall's house and returned with a prescription for 3 grains of morphine sulphate from Dr. DuVall. Government's Exhibit No. 2 which you hand me is that prescription. Then I took Rooney to the Santa Rita Drug Store in Tucson and gave him the money to fill this prescription. Pat Rooney had this prescription filled at the Santa Rita Drug Store and turned the morphine over to me which I kept in my possession in the narcotic safe in Phoenix until it was introduced in evidence in this trial.

Whereupon

DR. S. D. TOWNSEND

was called as witness on behalf of the government who testified as follows:

My name is S. D. Townsend. I am a licensed physician practicing in Tucson, Arizona. I examined Pat Rooney in the city jail on March 26, 1935 and did not find him suffering from any organic disease. He is a chronic addict to morphine sulphate.

Thereupon counsel for the government read and submitted the following hypothetical question to Dr. Townsend:

By Mr. Peterson: "Now, Doctor, assuming that a narcotic drug addict should apply to a practicing physician for a prescription for narcotic drugs and at the time of such application the physician had knowledge that such applicant was addicted to the use of morphine, and assuming that said applicant was not suffering from any incurable disease, and [20] assuming that without any physical examination except placing a stethoscope on the chest of the applicant and to feel his pulse, not even removing his clothes, such physician should write and deliver to such applicant a prescription calling for 8 half-grain morphine sulphate tablets with no endorsement on such prescription that the said applicant was suffering from any incurable disease except the endorsement 'Article 85, Exception 1', and no direction on said prescription as to the dosage of said morphine except 'Use as directed for relief of pain', and assuming that some several

(Testimony of Dr. S. D. Townsend.)

hours later on that same day the said applicant should again call upon said physician for another prescription for narcotic drugs and that without any physical examination of such applicant and knowing that the said applicant was then and there a drug addict, said physician should again write and deliver to said applicant a prescription calling for 6 half-grain morphine sulphate tablets with no endorsement on such prescription that this applicant was suffering from any incurable disease except the endorsement 'Article 85, Exception 1' and no direction on said prescription as to the dosage of such morphine except 'Use as needed for relief of pain'. Assuming further that the morphine so prescribed was to come into such applicant's possession to administer at such time and in such quantites as he desired to use it, state whether in your opinion such prescriptions were issued in good faith in the course of the professional practice only of such physician?''

Mr. HARDY: The defendant objects to said hypothetical question for the reason that it is in part essentially predicated upon Article 85, Exception 1 & 2, or Regulations No. 5, promulgated on January 1, 1928 by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, which Regulations are so promulgated in connection with the enforcement of the Harrison Narcotic Act, and which [21] are in evidence. The Article and Exceptions referred to in the hypothetical question are as follows:

(Testimony of Dr. S. D. Townsend.)

ARTICLE 85

"Purpose of issue.—A prescription, in order to be effective in legalizing the possession of unstamped narcotic drugs and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the act; and the person filling and receiving drugs under such an order, as well as the person issuing it, may be regarded as guilty of violation of the law."

"Exceptions.—Exceptions to this rule may be properly recognized (1) in the treatment of incurable disease, such as cancer, advanced tuberculosis, and other diseases well recognized as coming within this class, where the physician directly in charge of a bona fide patient suffering from such disease prescribed for such patient, in the course of his professional practice and strictly for legitimate medical purposes, and in so prescribing endorses upon the prescription that the drug is dispensed in the treatment of an incurable disease; or if he prefers he may endorse upon the prescription 'Exception (1), Article 85'. (2): A physician may prescribe for an aged and infirm addict whose collapse would result from the withdrawal of the drug,

(Testimony of Dr. S. D. Townsend.)

provided he endorses upon the prescription that the patient is aged and infirm, giving age; or if he prefers he may endorse upon the prescription 'Exception (2), Article 85'."

Mr. Hardy continuing: Said Article and Exceptions are contrary to the prohibitions of the Harrison Narcotic Act, [22] and are beyond the regulatory power conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue by said Act in so far as they apply to physicians and to this defendant; that if the Harrison Narcotic Act confers upon such executive officers power to so regulate physicians registered under the Act, then it is an unwarranted and unconstitutional delegation of power; that the Article and Exceptions are an unlawful attempt by executive officers of the government to legislate upon matters solely conferred upon Congress by the Federal Constitution; and lastly, that the regulations prescribed by said Article and Exceptions are an attempt to exert a power in its application to this defendant which is reserved to the several states.

The COURT: Objection overruled and defendant excepted.

The Witness answering: I should say "No."

At the close of the government's case in chief the defendant demurred to the evidence, and moved the

court to instruct the jury to return a verdict of acquittal, upon the following grounds:

That there is a fatal variance between the proof and the indictment in that the proof discloses that the sale of the morphine sulphate by the defendant was made to Government Narcotic Agent, C. V. B. Moore, and not to Pat Rooney, alias Fred Humphry, as charged in the indictment.

The COURT: Motion denied and defendant excepted.

At the close of the whole case defendant again demurred to the evidence, and moved the court to instruct the jury to return a verdict of acquittal upon the grounds made at the time the government closed its case in chief. The motion was denied and defendant excepted. [23]

Thereupon, and after the case was argued to the jury by counsel for the respective parties, the court charged the jury. The charge in its entirety is as follows:

"The COURT: Now, Gentlemen of the Jury, you have listened patiently and attentively to this case during the heat that has prevailed for the last four or five days in the court room. You have heard the evidence presented here by both the Government and the defense, and you have listened to the summing up by counsel for both the prosecution and the defense from their viewpoints of the case."

"Under the law, at the close of the evidence and the arguments of counsel, the duty devolves on the Court to charge you as to the law governing the case itself before the case is finally submitted to you for your verdict on the law and the evidence on the charges contained in the indictment."

"Now, Gentlemen, there is no higher duty to which a man can be called, which more absolutely demands that he not allow the slightest feeling of sentiment to affect the workings of his mind, than when he is charged to help decide whether the law of his country has been violated by a fellow citizen. That is the reason why the law required every juror to take a solemn obligation that he will discharge his duties without fear or favor. This is an obligation higher than and destructive of any fraternal, social or other tie which may exist between any juror and any one otherwise interested in the case, as party, counsel or officer of the Court. Honest and self-respecting jurors do not need such an oath to secure the proper discharge of their duties. It is administered to you only because the law required it to be done. Jurors who do respect themselves and their responsibilities do and should object to efforts which appear to them to be deliberate attempts to set their minds off from a true consideration of the case, or appeals to their emotions, feelings, likes and dislikes, and sympathies, and [24] intelligent jurors, who are honest and determined to do their full duty in their high office—for yours, Gentlemen, although a temporary, is a very high

office,—will not allow themselves to be worked off of the track of true consideration of what is evidence on the point at issue, nor will they heed arguments based on collateral matters, which often, in a trial of this nature, creep into the case and are sometimes unduly dwelt upon with no other purpose than to divert the minds of the jurors from the real and substantial things disclosed by the evidence in the case. Jurors in the proper discharge of their duties should permit none of these things to take their minds off of the issues presented to them, but should, without bias or prejudice either for or against the respective parties interested herein, weigh the evidence and give thereto such consideration as they honestly think the same is entitled to, and render their verdicts in accordance therewith."

"The jury system is the fairest and best institution ever devised to settle questions of fact. When it works in the right way, its results are right; when it goes wrong, it is often because something wrongfully thrown into its machinery causes it to work in the wrong way."

"Now, the defendant in this case, Gentlemen, is entitled to the individual opinion of each juror, and no juror should vote for the conviction of the defendant so long as he entertains a reasonable doubt of the defendant's guilt, notwithstanding the opinions of others of the jury."

"You know, Gentlemen, that a juror qualifies himself to make up his judgment only after he has given fair, full, impartial and candid consideration

to the facts in evidence. This means that he should bring to bear upon the question not only all his powers of mind, but that he should fully consider the views of his fellows. A criminal case is not submitted to jurors as individuals. No one juror is legally competent to decide it [25] adversely to the defendant on trial. It is submitted to the jury as a deliberative body, whose judgments are worthy only when they are produced by the contributions to the right solution of each member. Each juror, therefore, should not only attempt to think out the solution for himself, but he should allow his fellows to assist in his thinking. Even though having arrived at an opinion, he should consider with an open mind the diverse opinions of others. He should test his conclusions by the views of his fellows, and be ready not only to give his own views, but also to listen to those of others."

"In theory, at least, Gentlemen, a hung jury is seldom possible if every juror gives the same degree of fair, candid and cold-headed consideration to the case. This is so because the principles of reasoning and common sense are clear enough that men of average ability and reasonableness, and to such who are only competent for jury service, facts speak with much the same force. As jurors, Gentlemen, you apply to the work before you the same method of reasoning and the same standard of comparison of the weight of facts clearly established in the evidence as you would apply under equivalent conditions to a problem before you for solution in pri-

vate life. Under both circumstances your plain common sense, the education your experience and observations have brought you, are available with just the same degree of usefulness. Nothing resulting from your oath requires you to reason differently or change your mature method of reasoning from the course you would pursue in your private affairs in determining a serious question."

"The only effect of your official position as jurors is to face you with the obligation to calmly and seriously study the evidence to ascertain the clear existence of fundamental facts asserted to have been shown in the evidence, and to coordinate them properly in the line of proof so that, as jurors, you are able to say that the elemental facts of the guilt charged [26] against the defendant is shown to a reasonable certainty; whereas, if it were a private matter, you might be satisfied with a solution which is supported by the mere preponderance of evidence."

"Now, Gentlemen, the defendant in this case, Claude Emerson DuVall, is charged by the indictment with violations of the law of the United States known as the Harrison Narcotic Act. The indictment has been read to you. I will not read it again, because you will take it with you to your jury room. As you have noted from the reading, each of the two counts charges that on or about March 26th, 1935, in the District of Arizona, the defendant, a practicing physician, sold a quantity of morphine to one Pat Rooney, alias Fred Humphry, not on a

written order or blank form furnished for that purpose by the Commissioner of Internal Revenue, in the manner following, that the said defendant issued and dispensed to said Pat Rooney, alias Fred Humphry, a prescription for said morphine signed by the defendant, and that said Rooney, alias Humphry, was not then a patient of the said defendant doctor, and the said morphine was not dispensed by the defendant in the course of his professional practice only."

"The Harrison Narcotic Act is primarily a revenue measure. The provisions of the Act on which the charges against this defendant, contained in the indictment, are based are as follows: 'It shall be unlawful for any person to sell, barter, exchange or give away any of the products specified in Section 691 of this Title, except in pursuance of the written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.' The law then provides for the preservation and inspection of such orders so given, and further provides: 'Nothing contained in the Section shall apply (a) to the dispensing or distribution of any of the [27] aforesaid products to a patient by a physician registered under this Chapter in the course of his professional practice only'. In other words, the order form of the Commissioner of Internal Revenue is not required for the sale or distribution of narcotics if such distribution is made by a physician to a patient in the course of his professional practice only."

"The Harrison Narcotic Act further provides: 'The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of the Act into effect'. Such rules and regulations were duly promulgated, as required by the Act, and among other provisions of the regulations now in force and effect is the following: Article 85, which reads as follows: 'A prescription in order to be effective in legalizing the possession of unstamped narcotic products and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the Act.'"

"Now, there are certain exceptions to the rule, set forth as follows: 'Exceptions of this rule may be properly recognized, (1), in the treatment of incurable diseases, such as cancer, advanced tuberculosis, and other diseases well recognized as coming within this class, where a physician directly in charge of a bona fide patient suffering from such disease prescribes for such patient, in the course of his professional practice and strictly for legitimate medical purposes, and in so prescribing endorses upon the prescription that the drug is dispensed in the treatment of an incurable disease; or if he pre-

fers, he may endorse upon the prescription 'Exception [28] (1) Article 85'. (2) A physician may prescribe for an aged or infirm addict whose collapse would result from the withdrawal of the drug, provided he endorse upon the prescription that the patient is aged and infirm, giving age, or if he prefers he may endorse upon the prescription, 'Exception (2) Article 85'."

"Now Gentlemen, you are instructed that the phrases 'to a patient' and 'in the course of his professional practice only' as used in the statute and rules and regulations which have been read to you, are intended to confine the immunity of the registered physician in dispensing narcotic drugs strictly within the bounds of the physician's professional practice and not to extend it to sale by such physician intended to cater to the appetite or satisfy the cravings of one addicted to the drug only. A prescription issued for either of the latter purposes protects neither the physician who knowingly issued it nor the dealer who knowingly accepts and fills it."

"The statute does not prescribe the diseases for which morphine may be supplied. Regulation 85 in its provisions forbids the giving of a prescription to an addict or habitual user of narcotics not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute nor the regulations precludes a physician from giving an addict a mod-

erate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards."

"The term 'narcotic drugs', as used in the indictment and the statute which have been read to you, means opium, coca leaves, cocaine, and any salt, derivative or preparation of opium, coca leaves or cocaine."

"Now, Gentlemen, the evidence before you is undisputed that at all of the times mentioned in the indictment the defendant, Claude Emerson DuVall, was a physician and duly registered [29] as required by the Harrison Narcotic Act."

"It is also undisputed that if the sales or dispensations of morphine, as charged in the respective counts of the indictment were made, they were not made upon forms issued in blank for that purpose by the Commissioner of Internal Revenue. The circumstances under which an order of the Commissioner of Internal Revenue is required and the exceptions thereof have already been made known to you by the Court."

"The evidence also shows that morphine sulphate is a derivative or preparation of opium. The evidence is undisputed that if the sales or dispensations of the drugs were made as charged in the respective counts of the indictment, they were made upon written prescriptions issued by the defendant as a practicing physician."

"Now, Gentlemen, the defendant herein is charged in each of the two counts of the indictment with

the sale of morphine sulphate to one Pat Rooney, alias Fred Humphry, and that he issued prescriptions for the drug to him. Ordinarily the term 'sale' contemplates the disposal of one's own property to another, but under the laws of the United States and under this law, a sale may be effected by the issuance of a prescription for the drug, to be filled by another."

"The Penal Code of the United States prescribed that 'Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal' and punishable as such."

"Taking this Section of the statute, together with the Narcotic Act read to you, you are instructed that if you are convinced by the evidence beyond a reasonable doubt that the defendant, at the time he issued the prescription set forth in the indictment, or either of them, that the same were not issued in the course of his legitimate professional practice only, and you also find that [30] such drugs were obtained by the witness Rooney on such prescriptions, or either of them such sale would be consummated on the filling of the prescriptions and the defendant would be guilty under the law of taking a principal part in the prohibited sale of narcotics belonging to another, by unlawfully issuing such prescription or prescriptions to the would-

be purchaser, and you should so find by your verdict."

"Now, as you have noted from the reading of the exceptions set forth in the statute, the law does not prohibit a registered physician from dispensing the drugs to a patient by prescription strictly in the course of his professional practice, but you are instructed that if you are convinced by the evidence beyond a reasonable doubt that the defendant in this case, being a registered physician, issued the prescriptions for the drug set forth in the indictment, and that the same were not issued to a patient in the course of the defendant's professional practice only, but were issued with the intent that the recipient, the said Pat Rooney, alias Fred Humphry, should obtain the narcotics from a druggist upon such prescriptions, and that the defendant had not given the prescriptions, or either of them, in good faith to treat disease from which the said Pat Rooney, alias Fred Humphry, was then suffering, the defendant took a principal part in a prohibited sale of narcotics, and by so doing violated the law, no matter whether the druggist to whom the prescription was delivered for filling has knowledge of the circumstances under which the physician has given the prescription, or is advised of any relationship that may have existed between the physician who gave the prescription and the recipient of the same."

"You are instructed, Gentlemen, that it is unlawful for any person to dispense or distribute nar-

cotic drugs except in accordance with the provisions of the Harrison Narcotic Act, as the same has been read to you, and a physician who procures [31] the dispensing thereof through the instrumentality of a prescription not issued in the course of his bona fide professional practice as a treatment for diseases takes a principal part in a prohibited sale, even though there is no conspiracy or unlawful understanding between him and the druggist who fills the prescription, and that is true whether the prescription be taken to a specified druggist or not. All prescriptions are expected to be and are filled according to the desire of the purchaser, at whatever drugstore he may select. The druggist, if innocent, is protected by the prescription."

"In this case, if you are satisfied by the evidence beyond a reasonable doubt that the prescriptions, or either of them, were issued to Pat Rooney, alias Fred Humphry, as set forth in the indictment, and that, at the time of the issuance thereof, they, or either of them, were not issued in the course of the defendant's bona fide professional practice, such prescriptions were unlawfully issued and in violation of said Act."

"The good faith of the defendant treating the witness, Pat Rooney, as a physician, for the purpose of curing him from the narcotic habit is an important issue involved in this case. One of the objects of the Narcotic Act was no doubt intended to prevent the growing use of these narcotics deemed a menace to the nation by Congress. If a physician

and the others mentioned in the exceptions could sell and dispense these narcotics regardless of the fact whether it be done in good faith for the relief of a patient, then the moral object of the Act is entirely defeated, notwithstanding the fact that it is primarily a revenue measure. It cannot be claimed that a physician selling and dispensing these narcotics through a prescription, or otherwise, not in good faith for the purpose of securing the cure of one suffering from an illness, or to cure him from the narcotic habit, is doing so in the course of his professional practice only as prescribed by the express [32] language of the Act."

"Now, Gentlemen, you are instructed that when you come to consider of your verdict, the question for you to decide is as to whether or not the written prescriptions issued by the defendant, Claude Emerson DuVall, upon which the sales or dispensations are alleged to have been made, were issued by him in good faith to a patient in the course of his professional practice only. If they were, then the sales would be lawful and the defendant would be entitled to an acquittal on the respective counts of the indictment. If the prescriptions were issued in good faith and according to fair medical standards, in the curing of disease, and not merely to satisfy the cravings of the said person for such drug, then they may be said to have been issued in the course of the defendant's professional practice only; but if the prescriptions were not issued in good faith, but were issued to enable such person

to obtain morphine sulphate to satisfy his appetite and cravings for such drugs only, and not in the treatment of his patient, then the issuance of such prescriptions would not be in good faith nor in the course of the defendant's professional practice as a physician, and the sale and dispensing upon such prescriptions would not be lawful."

"You are instructed, Gentlemen, that the provisions of the Narcotic Act exempting a physician does not protect him if he dispenses the drug by writing a prescription for one who is not a bona fide patient, and it is not for the purpose of treating him in the course of his professional practice, and in this case, if the Government has shown to your satisfaction beyond a reasonable doubt that the prescriptions set forth in the respective counts of the indictment in this case were not issued by the defendant to a patient in good faith and according to fair medical standards, you would find the defendant guilty as charged. Unless you are so satisfied you would, of course, acquit the [33] defendant. If from the evidence offered in this case the defendant's conduct in prescribing for the witness Rooney conformed to fair medical standards, it would indicate good faith on the defendant's part; if not, it would suggest the dispensing of narcotics for commercial purposes in the manner forbidden by the Act."

"The law requires that narcotics be dispensed by a physician to a patient in the course of his professional practice only, as I have repeatedly told

you. In determining whether a prescription of narcotics by a physician is in the course of his professional practice, you are to consider if the prescribing of narcotics is in accordance with fair medical standards and in determining this question you will consider the testimony of all of the physicians who have testified here in the case, together with all the evidence in the case."

"You are instructed, Gentlemen, that a reputable physician duly in charge of a bona fide patient suffering from diseases known to be incurable, such as cancer, advanced tuberculosis and many other diseases, well recognized as coming within this class, may in the course of his professional practice and strictly for legitimate medical purposes, dispense and prescribe narcotics drugs for such diseases, provided the patients are personally attended by the physician and he regulates the dosage and prescribes no quantity greater than that ordinarily recognized by members of his profession to be sufficient for the proper treatment of the given case. Prescriptions issued for such purposes and under such conditions are issued in accordance with the said Harrison Narcotic Act and the regulations now in effect, promulgated in accordance therewith."

"You are instructed, Gentlemen, that a prescription issued by a practicing registered physician for morphine or other narcotics to a habitual user thereof, the prescription being issued by him in the course of his professional treatment in an

attempted cure of the habit, according to fair medical standards, and not for [34] the sole purpose of providing the user with such narcotics sufficient to keep him comfortable, is a prescription within the meaning of Section 2 of the Harrison Narcotic Act."

"You are further charged that if upon all the evidence, you find the prescriptions in this case written by this defendant were issued for such purpose, then the issuance of such prescriptions did not constitute a violation of the Harrison Narcotic Act."

"Now, if you find that the prescriptions written by the defendant which are in evidence in this case were written for the sole purpose of enabling the defendant to keep his patient, Pat Rooney, alias Fred Humphry, in such a condition as to enable him to treat a chronic or incurable disease from which the said patient was, in his opinion, suffering, or in treatment for a cure of Rooney's addiction to the drug, then you must find that the prescriptions were prescribed within the meaning of said Act."

"And you are further instructed that if upon all the facts of this case you find that the defendant honestly believed that the giving of morphine to the person named in the indictment was necessary according to fair medical standards to effect a cure or to stay the progress of disease from which said person was suffering, or to alleviate the pain thereof or to effect the cure of the addiction to the drug, and not merely for the purpose of satisfying the

cravings of an addict for the drug, even though in fact he made a mistake in the diagnosis of Rooney's condition when writing the prescription, then your verdict would be for the defendant."

"Now, Gentlemen, it has been shown by the evidence and it is admitted by the defendant that on prior occasions the defendant issued prescriptions containing morphine sulphate to the witness, Rooney. This testimony was admitted as bearing upon the intent and good faith with which the defendant issued the two prescriptions involved in the two counts of the indictment [35] only. You are not to convict the defendant because of the issuance of prior or other prescriptions. He is not on trial for having issued such prior or other prescriptions, and such prescriptions were admitted and are only to be considered by you as bearing upon and in determining the intent and the good faith of the defendant in issuing the prescriptions on which the sales are alleged in the indictment herein to have been made."

"You are charged that persons addicted to the use of morphine sulphate are diseased and are proper subjects for medical treatment. If you find, therefore, that the defendant prescribed the quantity of morphine sulphate prescribed in both counts of the indictment herein to said Pat Rooney, alias Fred Humphry, in the course of his professional practice only and according to fair medical standards for the treatment of such disease resulting from such addiction, then he was not violating the Harrison Narcotic Act."

"The Harrison Narcotic Act does not limit the quantity of morphine sulphate that a physician may prescribe for a person addicted to the use thereof, but the quantity which may be prescribed in such case is left to the judgment of the physician when acting in the course of his professional practice only and in accordance with fair medical standards."

"You are instructed that the issuing of two prescriptions on the same day by the defendant to the said Pat Rooney, alias Fred Humphry, for four grains and three grains, respectively, of morphine sulphate, is not in itself a violation of the Harrison Narcotic Act, if you further find that Rooney was at the time the patient of the defendant and that such prescriptions were issued by the defendant in the course of his professional practice only and in accordance with fair medical standards."

"Now, Gentlemen, you are instructed that the indictment in this case is of itself a mere accusation and a charge against the defendant, and no juror in the case should permit [36] himself to be to any extent influenced against the defendant merely on account of the indictment in the case."

"In order to convict the defendant of the crime charged in the indictment it is incumbent upon the Government to satisfy you beyond a reasonable doubt of the truth of every material allegation in the indictment. The law raises no presumption against the defendant, but every presumption of law is in favor of his innocence, and this presumption attends at every stage of the trial, until over-

come by competent evidence to the contrary. It is not necessary that the offense be proven to have been committed at the exact time specified in the indictment, but it is sufficient, so far as time is concerned, if the proof shows it to have been committed about the time specified in the indictment, and before the filing of the indictment. The offense must, of course, have been proven to have been committed within the District of Arizona. I charge you, Gentlemen, that as a matter of law, that if the offense has been committed within the State of Arizona it has been committed in the District of Arizona, because the District of Arizona embraces the entire State of Arizona."

"Now, Gentlemen, you are made by the law the sole judges of the facts in this case and of the credibility of each and all of the witnesses who have appeared here before you, and of the weight you will give to the testimony of the several witnesses who have been here on the stand. In determining the credibility of any witness and the weight you will give to his or her testimony, you have the right to take into consideration his or her manner while giving his or her testimony, his or her means of knowledge, any interest or motive he or she may have, if any such be shown, and the probability or improbability of the truth of his or her statements when considered in connection with all the other evidence in the case. If you believe that any witness has wilfully sworn falsely on any material fact in the case, then you have the right to wholly disregard

the test- [37] imony of such witness, except in so far as his or her statements may be corroborated by other credible evidence in the case."

"I charge you, Gentlemen, that before you can find the defendant guilty you must find him guilty beyond a reasonable doubt. A reasonable doubt, as applied to evidence in criminal cases, is just what the term implies, a reasonable doubt. It is such a doubt as you may entertain as reasonable men after a thorough review and consideration of all the evidence, a doubt for which a reason arising from the evidence or from a lack of evidence exists. It is not a mere possibility of a doubt, but a serious, substantial and well-founded doubt. While it is true that the Government is required to prove the guilt of the defendant beyond a reasonable doubt, it is not required to prove his guilt to a mathematical certainty. Such a thing as mathematical certainty cannot, of course, exist in the enforcement of law. All that the courts and juries can act upon is belief to a moral certainty. It may be said that everything relating to human affairs and depending upon human evidence is open to some fanciful doubt or conjecture. It would seem that the doctrine of reasonable doubt is not a convenient excuse to avoid doing something unpleasant, nor an occasion for stubbornness, but simply a call to candid and fair-minded men to be careful and not decide until they are convinced of the guilt of the defendant as charged to a reasonable certainty. When you are convinced to a reasonable certainty—not an actual certainty

but a reasonable certainty—you are convinced beyond a reasonable doubt. The terms are convertible."

"Some evidence has been brought during the progress of this trial showing that the witness Pat Rooney, to whom the sales alleged in the two counts of the indictment were made, was sent to the defendant's office and to his residence for the prescriptions alleged by or at the instigation of the Government officers, acting in the nature of a decoy. The law is that decoys are permissible to detect criminals but not to create them, to present [38] the opportunity to those having the intent or who are willing to commit a crime, but not to entrap law-abiding citizens unconsciously committing offenses. That is the distinction to be drawn by you. No officer is permitted to entrap an innocent person into the commission of a crime and then prosecute him or her, and no conviction on such evidence would or could be sustained, but if that officer has information which he follows up and if he finds that the defendant is a person willing to commit a crime, then it is his province, his right and his duty to give such person an opportunity to commit the crime or offense, and if he or she does commit such offense, then it is the duty of the officer to apprehend him or her. Public policy, of course, forbids that officers sworn to enforce the laws seek to have them violated, and that those whose duty it is to detect crimes should create them, but if the intent and purpose to violate the law were present, the

mere fact of the officer furnishing the opportunity is no defense to the person who then violated the laws. This is the distinction to be made by you. It would not be proper for an officer to go to an innocent man and induce him to commit an offense and then prosecute him, but if that officer goes to one ready and willing to violate the law and then offers him that opportunity, then that evidence may be used against the defendant. This is permissible, Gentlemen, because in many cases in no other way could a persistent violator of the law ever be apprehended or punished."

"Gentlemen, you are instructed that a witness who is a narcotic addict is a competent witness to testify on the trial of actions in this Court. The jury should take into consideration the fact of such addiction to the use of narcotics as affecting his character and credibility as a witness. In this case it is admitted that the witness, Pat Rooney, alias fred Humphry, was for a number of years an addict to the use of narcotics. You are instructed that you are not to arbitrarily disregard the testimony [39] of such witness solely because he is so addicted, but you should weigh his testimony as you would the testimony of any other witness, and apply the same rules as govern the testimony of witnesses generally, as stated here in these instructions."

"Now, gentlemen, during the taking of the testimony and in the progress of this trial certain hypothetical questions have been propounded to expert witnesses by both the Government and the defense,

and these expert witnesses, medical men, have appeared on the witness stand and have afforded you with answers to such hypothetical questions. You are instructed, Gentlemen, that a hypothetical question is a question which assumes a certain condition of things to be true, a certain number of facts to be proved or disproved, and calls upon the witness to assume all of the material facts stated to be true, and express his opinion as to certain conditions thereof. The witness to whom the hypothetical question is addressed assumes them to be true and bases his answer upon the assumed case. The opinion of the witness must therefore be brought to the test of the facts in order that you may judge to what weight the opinion is entitled. As I have stated to you, Gentlemen, certain members of the medical profession have been brought here by both the Government and the defense. This testimony is usually known as expert testimony, that is to say, the testimony of medical men who, by reason of their education and experience along the lines of evidence given by them are deemed to have such skill and knowledge thereof as to make their opinions admissible for the purpose of aiding the jury in arriving at a conclusion as to the disputed facts in this case. This sort of testimony is subject to the same scrutiny as any other evidence admitted in the case. The expert witnesses are to be subjected to the same tests as other witnesses, and you may look, to their appearance and demeanor on the stand, their bias and interest in the case, if any shall appear to you, and in fact test their credibility as

you would that of any other [40] witness. You may accord the testimony of such witnesses whatever weight, under all the circumstances, that you may find it entitled to, or you may disregard it entirely, or in part, in so far as you may believe from all the facts and circumstances in the case and the common experience of mankind that it is reliable or unreliable. In short, the opinions of the medical experts in this case are to be considered by you in connection with all the other evidence in the case and subject to the same tests."

"Now, Gentlemen, the defendant has brought to the stand here several witnesses who have testified to his good reputation. The testimony as to his truth and veracity has been received here in the case. You should consider such evidence, together with all the other evidence in the case, in arriving at a verdict, not only where a doubt exists as to the defendant's guilt but for the purpose of creating a reasonable doubt, but if from all the evidence in the case, including the evidence of his good character and reputation, you are satisfied of his guilt beyond a reasonable doubt, such evidence of good character or reputation will not avail the defendant as a defense or entitle him to an acquittal. The law permits a defendant at his own request to testify in his own behalf. The defendant in this case has availed himself of that right. His testimony is before you and you must consider how far it is credible. The special personal interest which he has in the result of this case may be considered by you in weighing his evidence and in determining how far

or to what extent, if at all, it is worthy of credit. In considering the credibility of or weight which you should attach to the testimony of the defendant you should regard, among other things, the inherent probability or improbability of his statements and to what extent the same have been corroborated or contradicted by other evidence in the case. Where a witness has a direct personal interest in the result of a case, especially a criminal case, the temptation may be strong to color, pervert or withhold [41] the facts."

"Gentlemen, you should not consider as evidence any statements of counsel made during this trial, unless such statements was made as an admission or a stipulation conceding the existence of a fact or facts, or based upon evidence adduced during the trial of this case. You must not consider for any purpose any evidence offered and rejected or which has been stricken out by the Court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced here and the inferences which you may deduce therefrom."

"Now, Gentlemen, when you were questioned as to your qualifications to serve as trial jurors in this case you were asked specifically if you would determine this case solely on the evidence adduced here on the stand and the instructions which would be given you by the Court, that you would not allow

any matters of feeling or sympathy to creep into your deliberations in considering the verdict that you would render in this case. I call your attention again to that qualification on your part as jurors in the case. You will not consider, Gentlemen, whether the punishment in case of a conviction on a charge of this character is severe or light; that is a matter that is not within the province of the jury, but rests entirely as a matter within the control of the Court, subject to such limitations as are provided by law."

"The issue before you, Gentlemen, as stated in the beginning, is whether or not the defendant sold and dispensed,—if you find that he did sell and dispense—the drugs as charged in the indictment in the course of his legitimate professional practice in an attempt to alleviate or cure the ills of a bona fide patient, or whether he sold or dispensed these drugs—if you are satisfied beyond a reasonable doubt that he did sell or dispense them—merely for the purpose of gratifying the appetite [42] of an unfortunate victim of the drug. If you are satisfied beyond a reasonable doubt by the evidence in this case that he did dispense the drugs mentioned in the indictment and that the same were not dispensed to a patient in the course of his legitimate professional practice only, but were dispensed for the purpose of gratifying the appetite of a victim of the drug, you would by your verdict find the defendant guilty as charged in the respective counts of the indictment, in which you are so convinced. If you are not so convinced beyond a reasonable doubt you will, of course, acquit the defendant."

"When you retire to the jury room you will take with you the indictment and the form of verdict, which is substantially in the following form: 'We, the jury, duly empaneled and sworn, on our oaths do find the defendant Claude Emerson DuVall—blank—as charged under the first count of the indictment', in which blank you will insert the words 'guilty' or 'not guilty', as coincide with your findings on the first count, 'and—blank—as charged in the second count of the indictment,' in which blank space you will fill in and supply your conclusions, stated in the same manner, and have your verdict signed by your foreman and returned into open court. The law requires that all twelve of you gentlemen reach a verdict on each of the two counts, and that means that the verdict of the jury should be unanimous."

"Are there any exceptions to be noted?"

Mr. HARDY: We have no others to submit, but for the purpose of the record, as we are required to do, and which has been heretofore raised, we do take exceptions to that part of your Honor's charge with respect to the moral aspect of the Harrison Narcotic Act and also with respect to the regulations thereunder, in so far as they are unconstitutional and are in conflict with the Harrison Act.

The COURT: Very well.

Objection overruled and exception allowed. [43]

On June 31, 1935 the jury, after deliberating upon its verdict, returned in open court its verdict finding the defendant guilty as charged in both counts of the indictment.

On July 1, 1935 the court pronounced judgment upon the defendant sentencing him as follows:

Upon count one of the indictment to 14 months imprisonment in such penitentiary or institution as the Attorney General may designate; and to pay a fine of $500.00.

Upon count two of the indictment to 14 months imprisonment in such penitentiary or institution as the Attorney General may designate to run concurrently with the sentence on count one; and to pay a fine of $500.00.

After judgment was pronounced, and on the same day, the defendant filed a Notice of Appeal which recites as follows:

[Title of Court and Cause.]

NOTICE OF APPEAL.

Name and address of Appellant:
Claude Emerson DuVall,
1139 North Stone Avenue,
Tucson, Arizona.

Name and addresses of Appellants' attorneys:
Leslie C. Hardy,
315 Valley National Bank Building,
Tucson, Arizona.
Clarence V. Perrin and Milton H. Cohan
(Cohan and Perrin)
Central Building,
Tucson, Arizona.

Offense:

Violation of Section 696, Title 26, U. S. C. A. (Issuing prescriptions by physician in violation of Harrison Narcotic Act.)

Date of Judgment:

July 1st, 1935. [44]

Brief description of judgment or sentence:

First count of the indictment: Imprisonment for 14 months in such penitentiaary, institution or Road camp as the Attorney General may designate, and a fine of $500.00.

Second Count of the indictment: Imprisonment for 14 months in such penitentiary, institution or road camp as the Attorney General may designate, to run concurrently with the first count, and a fine of $500.00.

Name of prison where now confined, if not on bail:

Appellant admitted to bail on appeal in the sum of $5,000.00.

I, the above-named appellant hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

CLAUDE EMERSON DuVALL
Appellant.

Dated at Tucson, Arizona, this 1st day of July, 1935.

GROUNDS OF APPEAL.

1. That the indictment does not set forth facts sufficient to constitute an offense against the laws of the United States.

2. That there is a variance between the proof and the indictment in that the proof discloses that the sale of the narcotics in the manner and form charged in the indictment was made to a person other than the person named in the indictment.

3. That the Court erroneously charged the jury with respect to the application of Article 85, and Exceptions 1 & 2 thereto, of Regulations No. 5 promulgated by the Treasury Department on January 1, 1928 pursuant to the Harrison Narcotic Act.

[45]

4. That the Court erroneously charged the jury with respect to the moral aspect of the Harrison Narcotic Act in its application to the defendant who was a licensed physician registered under said Act.

(Filed July 1, 1935)

After the foregoing Notice of Appeal was filed, and on the same day, the court of its own motion, made and entered the following order:

[Title of Court and Cause.]

ORDER.

The defendant having filed with the Clerk of this Court his notice of appeal from the verdict and sentence herein, it is

ORDERED that said defendant be admitted to bail on appeal herein in the sum of Five Thousand Dollars ($5,000.00).

IT IS FURTHER ORDERED that counsel for the defendant prepare and lodge with the Clerk of this Court his proposed bill of exceptions, together with his assignments of error on or before August 7th, 1935, and that the Government prepare and file any proposed amendments or exceptions thereto on or before August 17th, 1935, and that both parties appear before this Court on Monday, August 19th, 1935 to settle said bill of exceptions, and that the Clerk of this Court forward to the Clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, such bill of exceptions when settled, the assignments of error and such portions of the record as the appellant shall request by filing praecipe therefor on or before August 7th, 1935, together with such additional portions of the record as the Government shall request in its praecipe filed before August 17th, 1935, together with the certificate of the Clerk of this Court.

IT IS FURTHER ORDERED that defendant furnish cost bond to the Government in the sum of Two Hundred Fifty Dollars, and [46]

IT IS FURTHER ORDERED that all copies required by the Clerk in preparation of the record in accordance herewith be furnished by counsel at the time of filing their praecipe as hereinbefore ordered and that a copy of this order be forwarded by the Clerk of this Court to the Clerk of said Circuit

Court of Appeals, together with the duplicate notice of appeal filed herein and the docket entries required.

(Filed July 1, 1935)

AND NOW, in furtherance of justice, and that right may be done the defendant, he files and presents the foregoing Bill of Exceptions in this cause, and prays that the same may be approved, settled and allowed, and signed and certified by the Honorable Judge of this Court as provided by law.

DATED at Tucson, Arizona, in the district aforesaid, this 5th day of August, 1935.

LESLIE C. HARDY,
Attorney for Defendant-Appellant.

CERTIFICATE AND ORDER ALLOWING, APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing Bill of Exceptions was filed on the 5th day of August, 1935, which is within the time fixed for filing said Bill of Exceptions by the order of this Court filed herein on July 1st, 1935 and set forth in the foregoing Bill of Exceptions; that said Bill of Exceptions is correct, and it is hereby approved, allowed and settled, and filed as a part of the record herein on the day of this Certificate and Order, which is within the time fixed for allowing, approving, and settling said Bill of Exceptions by said order of this Court dated July 1st, 1935, all of which is done within the May, 1935 term of this

Court whereat the verdict was returned and the judgment pronounced herein.

DATED at Tucson, in the district aforesaid, this 17th [47] day of August, 1935.

ALBERT M. SAMES,
United States District Judge
for the District of Arizona.

Service of a true copy of the foregoing Bill of Exceptions admitted this 5th day of August, 1935.

FRANK E. FLYNN,
U. S. Attorney.
By K. BERRY PETERSON,
Assistant U. S. Attorney.

[Endorsed]: Deft's Proposed Bill of Exceptions. Filed Aug. 5, 1935.

[Endorsed]: Bill of Exceptions. Filed Aug. 17, 1935. [48]

[Title of Court.]

MINUTE ENTRY OF SATURDAY,
AUGUST 17, 1935.
(Tucson General Minutes)

May 1935 Term At Tucson

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

ORDER APPROVING BILL OF EXCEPTIONS

John P. Dougherty, Esquire, Assistant United States Attorney, appears for the Government. No

appearance is made on behalf of the Defendant.

Counsel for the Government now represents to the Court that the Government has no amendments to propose to the Defendant's Proposed Bill of Exceptions heretofore filed herein and that the Government has no objection to make to the form thereof, and that said Proposed Bill of Exceptions is correct. Whereupon, it appearing to the Court that the said Proposed Bill of Exceptions has been filed within the time allowed and that no objections or proposed amendments will be made thereto by the Government.

IT IS ORDERED that said Proposed Bill of Exceptions be, and the same is hereby allowed, settled and approved as the bill of exceptions herein and made a part of the record in this cause. [49]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Claude Emerson DuVall, as Principal and L. E. Wyatt and Margaret Wyatt, his wife, and Alma Clayton, a widow, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs,

executors and administrators, jointly and severally, by these presents:

Sealed with our seals and dated this 1st day of July, 1935.

WHEREAS, lately at the May 1935 term of the District Court of the United States, in and for the District of Arizona, a judgment was rendered and sentence pronounced against the said Claude Emerson DuVall in the above entitled cause, and the said Claude Emerson DuVall has filed a notice of appeal from said judgment and sentence to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, the condition of the above obligation is such that if the said Claude Emerson DuVall shall prosecute said appeal to effect, and answer all costs if he shall fail to make good his pleas, then the above obligation to be void, else to remain in full force and virtue. [50]

[Seal] CLAUDE EMERSON DuVALL,
Principal.

[Seal] L. E. WYATT,
Surety.

[Seal] MARGARET WYATT,
Surety.

[Seal] ALMA CLAYTON,
Surety.

State of Arizona,
County of Pima—ss.

L. E. WYATT and MARGARET WYATT, who are husband and wife, and the persons whose names are subscribed as sureties to the above undertaking, being duly sworn, state that as such sureties named in the above undertaking, they are residents and householders within the County of Pima, State of Arizona, and that they are worth the amount specified in the said undertaking as the penalty thereof, over and above all just debts and liabilities, exclusive of property exempt from execution.

L. E. WYATT,
[Commissioner's Seal] MARGARET WYATT.

Subscribed and sworn to before me this 1st day of July, 1935.

C. WAYNE CLAMPITT,
United States Commissioner.

State of Arizona,
County of Pima—ss.

ALMA CLAYTON, the person whose name is subscribed as one of the sureties to the above undertaking, being duly sworn, states that as one of the sureties named in the above undertaking, she is a resident and householder within the County of Pima, State of Arizona, and that she is worth the amount specified in the said undertaking as the penalty thereof, over and above all just debts and liabilities, exclusive of property exempt from execution.

ALMA CLAYTON.

Subscribed and sworn to before me this 1st day of July, 1935.

[Commissioner's Seal]

C. WAYNE CLAMPITT,
United States Commissioner. [51]

The foregoing Cost Bond on Appeal is approved this First day of July, 1935.

ALBERT M. SAMES,
U. S. District Judge.

Filed July 1, 1935.

[Endorsed]: Filed Jul. 1, 1935. [52]

[Title of Court and Cause.]

DEFENDANT'S PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the District Court of the United States for the District of Arizona:

You are hereby respectfully requesto to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the appeal taken by the defendant in the above entitled cause, and to include in such transcript of record the following:

1. The Indictment.

2. Bill of Exceptions when allowed, approved and settled, including the Certificate of the United States District Judge thereto and the Order approving, settling and allowing said bill.

3. Assignment of Errors.
4. Cost Bond on Appeal.
5. This Praecipe.

Dated at Tucson, in the district aforesaid, this 5th day of August, 1935.

LESLIE C. HARDY
Attorney for Defendant-Appellant.

Service of the above Praecipe acknowledged and accepted this 5th day of August, 1935.

FRANK E. FLYNN
United States Attorney
By K. BERRY PETERSON
Ass't United States Attorney.

[Endorsed]: Filed Aug. 5, 1935. [53]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

United States of America,
District of Arizona—ss.

I, J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Claude Em-

erson DuVall, Defendant, numbered C-7287 Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 53, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $8.00 and that said sum has been paid to me by the appellant.

WITNESS my hand and the Seal of the said Court this 19th day of August, 1935.

[Seal] J. LEE BAKER, Clerk
United States District Court
District of Arizona. [54]

[Endorsed]: No. 7908. United States Circuit Court of Appeals for the Ninth Circuit. Claude Emerson DuVall, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed August 23, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7908

United States
Circuit Court of Appeals
For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Apellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

LESLIE C. HARDY,
422 Professional Building,
Phoenix, Arizona.
Attorney for Appellant.

No. 7908

United States
Circuit Court of Appeals
For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Apellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

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No. 7908

United States Circuit Court of Appeals

For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Apellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

1. *The Facts*

The appellant, Claude Emerson DuVall, appeals from a judgment of the United States District Court for the District of Arizona adjudging him guilty of a violation of Sec. 696, Title 26, U.S.C.A. (Harrison Narcotic Act). The indictment is in two counts and it was returned by the grand jury at Tucson on May 2, 1935 (Tr. 1). The appellant, when indicted, was a physician licensed to practice in the State of Arizona and he was registered under the Harrison Narcotic Act and had paid the tax required by the Act (Tr. 17, 18).

By the first count of the indictment appellant, as a physician, was charged with selling to Pat Rooney, alias Fred Humphrey, four grains of morphine sulphate not in pursuance of a written order on a form issued in blank for that purpose by the Commissioner of International Revenue in that appellant issued and dispensed to Rooney a prescription for that amount of the drug, Rooney not then being a patient of appellant, and appellant not so dispensing and distributing the drug in the course of his professional practice only. The second count of the indictment differs from the first only in charging the quantity of the drug dispensed, it alleging that three grains of morphine were dispensed (Tr. 2).

The first trial of the case began on June 12, 1935, and terminated June 20, 1935, as a result of the jury disagreeing (Tr. 15). The second trial came on for hearing June 25, 1935 (Tr. 15) and on June 31, 1935, a verdict of guilty on both counts of the indictment was returned against appellant (Tr. 52). On July 1, 1935, appellant was sentenced to imprisonment for fourteen months on each count, sentence upon the second count to run concurrently with the first and he was fined $500.00 on each count (Tr. 53). On July 1, 1935, (the same day he was sentenced) appellant filed a notice of appeal (Tr. 53). Pursuant to an order of the trial court entered *ex mero motu* appellant was enlarged upon bail pending appeal (Tr. 55).

The proof disclosed that Rooney (the person who received the prescriptions described in the indictment) had been addicted to the use of morphine for 18 or 19 years (Tr. 18) and he had used as much as 10 to 15 grains per day. Rooney received both prescriptions from appellant on the same day (Tr.

19, 20). The government witness Moore, who was a federal narcotic agent, sent Rooney to appellant to secure the prescriptions and gave Rooney the money to pay for them. He also gave Rooney the money to have the prescriptions filled (Tr. 19, 20, 21). The agent Moore received from Rooney the drug obtained on the prescriptions and Moore kept the drug in his possession until it was introduced in evidence at the trial (Tr. 19, 20, 21). None of the drug was used by Rooney (Tr. 19, 20, 21).

2. *The Questions Presented*

Counsel for appellant has diligently attempted to discard all driftwood and to present as succinctly as possible suggested errors which appear substantial both as to law and facts. Five major assignments of error are urged and these are divided into subjects correlated to the principal errors assigned (Tr. 5). They relate to:

I The sufficiency of the indictment (Tr. 5, 6).

II A hypothetical question propounded to a government witness—physician (Tr. 6, 7, 8).

III A variance between the proof and the indictment only as respects the allegation of sale (Tr. 8, 9).

IV, V The error of the trial court in charging the jury with respect to two instructions (Tr. 9 to 14).

The sufficiency of the evidence to sustain the verdict is not urged because the errors assigned, if meritorious, would defeat the judgment regardless of the sufficiency of the evidence to sustain it.

Counsel for the government proposed no amendments to the Bill of Exceptions and agreed that it is correct (Tr. 59).

SPECIFICATIONS OF ERROR

SPECIFICATION I

(Assignment of Error I, Tr. 5)

(a) Neither counts of the indictment alleges that the prescription mentioned therein was filled or that Rooney obtained the drug thereon, or at all.

(b) The Harrison Narcotic Act, in its essential constitutional aspect is a revenue measure, and has no application to the indictment herein because it charges appellant, as a physician, with issuing two prescriptions for small quantities of narcotic thereby disclosing upon its face that appellant did no act which deprived, or intended to deprive, the United States of revenue.

SPECIFICATION II

(Assignment of Error II, Tr. 6, 7, 8)

The hypothetical question propounded by counsel for the government to the government witness, Dr. S. D. Townsend, is in an essential part based upon Article 85, Exceptions 1 & 2, of Regulations No. 5 promulgated January 1, 1928, by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury (Tr. 21, 22, 23, 24). The hypothetical question, while stating that appellant delivered the prescriptions for morphine to an addict, nevertheless further states and assumes that the ad-

dict was not at the time suffering from *incurable* disease, and thus the question is founded in an essential part upon Article 85, Exceptions 1 & 2 (Tr. 24, 25) which are void because

(a) The Harrison Narcotic Act does not confer regulatory power upon the executive officers named to the extent thus asserted.

(b) The regulation is beyond the power of the Congress to confer upon executive officers.

(c) The Harrison Narcotic Act itself sufficiently and completely defines the professional conduct of a physician registered under the Act.

(d) The regulation is an assertion of power reserved to the several states.

SPECIFICATION III

(Assignment of Error III, Tr. 8, 9)

There is a variance between the proof and the indictment in that the proof discloses that the sale, if there was a sale within the meaning of the Harrison Act, was made to Narcotic Agent Moore rather than to Rooney, the person named in the indictment (Tr. 18, 19, 20, 21).

SPECIFICATION IV

(Assignment of Error IV, Tr. 9 to 13)

The court erred in giving the following instruction to the jury during the course of its charge, viz:

"The Harrison Narcotic Act further provides: 'The Commissioner of Internal Revenue, with

the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of the Act into effect.' Such rules and regulations were duly promulgated, as required by the Act, and among other provisions of the regulations now in force and effect is the following: Article 85, which reads as follows: 'A prescription in order to be effective in legalizing the possession of unstamped narcotic products and eliminating the necessity for use of order forms, must be issued for legitimate medical purposes. An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use, is not a prescription within the meaning and intent of the Act.'"

"Now, there are certain exceptions to the rule, set forth as follows: 'Exceptions to this rule may be properly recognized, (1), in the treatment of incurable disease, such as cancer, advanced tuberculosis, and other diseases well recognized as coming within this class, where a physician directly in charge of a bona fide patient sufferin the course of his professional practice and strictly for legitimate medical purposes, and in so prescribing endorses upon the prescription that the drug is dispensed in the treatment of an incurable disease; or if he prefers, he may endorse upon the prescription 'Exception (1) Article 85'. (2) A physician may prescribe for an aged or infirm addict whose collapse would result from the withdrawal of the drug, provided he endorse upon the prescription, 'Exception (2) Article 85'."

"Now, Gentlemen, you are instructed that the phrases 'to a patient' and in the course of his professional practice only' as used in the statute

and rules and regulations which have been read to you, are intended to confine the immunity of the registered physician in dispensing narcotic drugs strictly within the bounds of the physician's professional practice and not to extend it to sale by such physician intended to cater to the appetite or satisfy the cravings of one addicted to the drug only. A prescription issued for either of the latter purposes protects neither the physician who knowingly issues it nor the dealer who knowingly accepts and fills it."

"The statute does not prescribe the disease for which morphine may be supplied. Regulation 85 in its provisions forbids the giving of a prescription to an addict or habitual user of narcotics not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute nor the regulations precludes a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards." (Tr. 32, 33, 34).

The foregoing instruction is erroneous and prejudicial for the following reasons:

(a) It is objectionable for all the reasons urged under Specification II supra.

(b) It is contradictory and conflicting in that it instructed the jury that Article 85, Exception 1, precludes a physician from prescribing morphine to an addict not suffering from an incurable disease, or who is not aged and infirm, and at the same time instructed the jury that Article 85, Exceptions 1 & 2, do not preclude a physician from prescribing small amounts of morphine for

an addict sufficient to relieve a condition incident to addiction.

SPECIFICATION V

(Assignment of Error V, Tr. 13, 14)

The court erred in giving the following instruction to the jury during the course of its charge, viz:

> "The good faith of the defendant treating Pat Rooney, as a physician, for the purpose of curing him from the narcotic habit is an important issue involved in this case. *One of the objects of the Narcotic Act was no doubt intended to prevent the growing use of these narcotics deemed a menace to the nation by Congress.* If a physician and the others mentioned in the exceptions could sell and dispense these narcotics regardless of the fact whether it be done in good faith for the relief of a patient, *then the moral object of the Act is entirely defeated,* notwithstanding the fact that it is primarily a revenue measure. It cannot be claimed that a physician selling and dispensing these narcotics through a prescription, or otherwise, not in good faith for the purpose of securing the cure of one suffering from an illness, or to cure him from the narcotic habit, is doing so in the course of his professional practice only as prescribed by the express language of the Act." (Tr. 37, 38). (Italics ours)

The foregoing instruction is erroneous and prejudicial for the following reasons:

(a) It is in part predicated upon the moral and social aspect of the Harrison Narcotic Act whereas the Act can be justified only as a revenue measure.

(b) An instruction treating with the moral or social aspect of the Harrison Narcotic Act

could have no proper place in the court's charge and it prejudiced the jury against appellant.

(c) The instruction precluded appellant from prescribing morphine for Rooney to relieve a condition incident to his addiction to the drug, and confined appellant to prescribing the drug to cure Rooney of morphine addiction.

BRIEF OF THE ARGUMENT

SPECIFICATION OF ERROR I

THE INDICTMENT IS FATALLY DEFECTIVE BECAUSE IT (a) FAILS TO ALLEGE THAT ROONEY OBTAINED THE DRUG ON THE PRESCRIPTIONS OR THAT A SALE OF THE DRUG WAS MADE OTHERWISE BY APPELLANT AND (b) BECAUSE THE INDICTMENT DOES NOT DISCLOSE THAT APPELLANT COMMITTED THE OFFENSE OF DEPRIVING THE GOVERNMENT OF REVENUE AS PROVIDED BY THE HARRISON NARCOTIC ACT.

(a) Both counts of the indictment allege that appellant did issue and dispense to the said Pat Rooney, alias Fred Humphrey, a certain prescription for the designated grains of morphine sulphate, but the indictment does not allege that the prescriptions were filled or that Rooney obtained the drug (Tr. 1, 2, 3). This defect in the indictment was attacked by demurrers (Tr. 16, 17) which were overruled and exception noted (Tr. 17, 18). The defect in the indictment in this respect is fatal to its validity.

Aiton vs. U. S. (CCA 9) 3 Fed. (2nd) 992;
Strader vs. U. S. (CCA 10) 72 Fed. (2nd) 589

The indictment considered in the Aiton case, decided by this court, went farther than the indictment in this case by alleging that there was an "intent" and "purpose" to sell the drug. Here there is only the restricted allegation of "issuing" and "dispensing" the *prescription.*

In Strader vs. U. S. supra, the Circuit Court of Appeals for the Tenth Circuit cited and followed the decision of this court in the Aiton case and said:

> "The mere writing of a prescription with the intent and purpose that the person to whom it is given will obtain the drug is not a violation of the statute. Acquisition of the opiate is required to constitute the completed offense."

Perhaps counsel for the government will place some reliance upon the cases of Nelms vs. U. S. (CCA 9) 22 Fed. (2nd) 79, and Manning vs. U. S. (CCA 8) 31 Fed. (2nd) 911, but if so they must be read with the understanding that the indictments there considered alleged the drug was actually obtained by the persons receiving the prescriptions. In the Nelms case it was considered (but assuredly with regard to the specific allegations of the indictment in that case) that Sec. 332 of the Criminal Code had some application. That section provides in effect that one who aids and abets in the commission of an offense is a principal actor. The offense assuredly must be completed before one may be charged with aiding or abetting its commission. It was so decided by this court in Yenkichi Ito vs. U. S. (CCA 9) 64 Fed. (2nd) 73 (Cert. den. 289 U. S. 762). The case of Manning vs. Biddle (CCA 8) 14 Fed. (2nd) 518, cited in the Yenkichi Ito case, is decisive of the point.

(b) The indictment in this case reveals a studious effort upon the part of the pleader to avoid the ef-

fect of the decision of the Supreme Court in the case of Linder vs. U. S. 268 U. S. 5, which reversed the decision of this court (290 Fed. 173). The indictment here does not allege that appellant was registered under the Harrison Narcotic Act or that Rooney was his patient (Tr. 1, 2, 3). The proof discloses that appellant was so registered (Tr. 18) and that Rooney had been addicted to morphine for 18 or 19 years at the time appellant prescribed for him (Tr. 18).

The small amount of the drug prescribed negatives the conclusion that appellant had in view a purpose to evade the payment of the tax required by the Harrison Narcotic Act and, since the drug was dispensed by two prescriptions calling for only three and four grains of morphine respectively, it cannot be said that the dispensing was not in the course of appellant's professional practice as required by the Act. Sec. 696, Title 26, U.S.C.A., and Linder vs. U. S., supra, reaffirmed in Boyd vs. U. S. 271 U. S. 104.

If it may be said that the lack of allegations in the indictment avoids the application of the Linder case to it in the respects urged in this subdivision (b) of Specification I, then we now mention that the argument made here and subsequently, in its application to the facts proved, and the errors assigned, will disclose that the whole case falls squarely within the doctrine of the Linder case.

SPECIFICATION OF ERROR II

THE HYPOTHETICAL QUESTION EXCLUDED THE PRESCRIBING OF MORPHINE BY APPELLANT TO ROONEY WHO WAS AN ADDICT NOT SUFFERING WITH INCURABLE DISEASE.

The hypothetical question considered under this Specification, the objections thereto and the exception, appear at pages 22 to 25 of the Transcript.

Article 85, Exception 1, referred to in the hypothetical question, and the question itself, limited appellant to prescribing the drug for incurable disease. There was no alternative under the regulation (Tr. 24, 25) since the Commissioner of Internal Revenue by this regulation has in this manner definitely proscribed the professional practice of a physician in dispensing morphine to an addict. Under it a physician can only prescribe for *incurable* diseases such as cancer, advanced tuberculosis and other diseases *within this class*, and to aged and infirm addicts. The Harrison Narcotic Act, while it authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to prescribe rules and regulations for the enforcement of the Act (Sec. 704, Title 26, U.S.C.A.) does not delegate to him authority to restrict the practice of a physician in the manner attempted by Article 85. The Act itself (Sec. 696, Title 26, U.S.C.A.) regulates the conduct of the physician in prescribing the narcotic by enacting that he may prescribe it in the "course of his professional practice only." That practice is established by testimony of physician based upon standards accepted by the profession, not by regulations arbitrarily fixed by the Commissioner of Internal Revenue. The Commissioner has said the disease must be incurable, or the addict aged and infirm, before the physician may prescribe the drug. Therefore he excludes administering morphine for diseases which may be cured, however distressing and painful. The Commissioner says the physician may not prescribe the drug to keep the addict comfortable by maintaining his cus-

tomary use. He thereby excludes dispensing the drug to an addict to relieve a condition *incident to addiction.*

In the Linder case, the Supreme Court refused to tolerate such a restriction upon a physician in prescribing narcotics for an addict although not suffering from incurable disease, nor aged and infirm. Said the court:

> "It (meaning the Harrison Act) says nothing of 'addicts' *and does not undertake to prescribe methods for their medical treatment.* They are diseased and proper subjects for such treatment, and we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to one of them in the ordinary course and in good faith four small tablets of morphine for *relief of conditions incident to addiction.* (Italics ours)

This pertinent part of the Linder decision undoubtedly was not considered by the Commissioner of Internal Revenue when he promulgated Article 85. He continued on where the Congress assumed it constitutionally left off.

Continuing the Supreme Court said:

> "What constitutes bona fide medical practice must be determined upon consideration of *evidence and attending circumstances.*" (Italics ours)

Congress never intended that the Commissioner of Internal Revenue should determine what constitutes bona fide medical practice, because otherwise there would be an unwarranted delegation of power.

Hurwitz vs. U. S. (CCA 8) 280 Fed. 109 and cases cited;

Morrill vs. Jones, 106 U. S. 466.

In the case of Hurwitz vs. U. S., supra, the trial court had instructed the jury as follows:

> "A physician is not in personal attendance unless he is in personal attendance of such patient away from his office."

The instruction was taken from the language of a regulation also promulgated by the Commissioner of Internal Revenue for the enforcement of the Harrison Narcotic Act. The court in declaring the regulation void, because beyond the authority delegated, said:

> "The evidence showed that what the defendant did was at his office. We presume the court took the language used from the rule above mentioned * * * * *. The power of the commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for making all needful rules and regulations for carrying the provisions of the Narcotic Act into effect, did not confer the power to say that a physician could not personally attend a patient at his office. The enforcement of the Act did not require any such rule, and it is contrary to the language of the Act itself, *which is plain and unambiguous*, and says nothing about where the patient shall be when personally attended. (Italics ours)

In support of its decision, the court cites several cases decided by the Supreme Court of the United States, including the case of Morrill vs. Jones above cited.

It is conceded that the hypothetical question propounded to Dr. Townsend, or to any other physician having regard for his professional reputation, could only have been answered negatively since it committed the witness to judging the professional conduct of appellant by limiting that conduct to prescribing the drug for incurable disease only. Rooney was not incurably diseased, as the question stated, but he was a chronic morphine addict (Tr. 47) using as much as 10 or 15 grains per day (Tr. 18). The question as propounded and answered excluded the possibility of the jury returning a verdict favorable to appellant. Probably in order to frustrate the attack directed at it, the question is made to state that two prescriptions were dispensed to the addict on the same day, but that was likewise true in the Linder case and the prescriptions considered there were for different narcotics!

The accepted practice as established by the evidence of other physicians determines the professional conduct of his fellow physicians in prescribing narcotics, not the arbitrary conclusion of the Commissioner. Therefore the hypothetical question should not have embraced the regulation of the Commissioner by reference to it and by stating the purport of it. Linder vs. U. S., supra.

SPECIFICATION OF ERROR III

THE INDICTMENT ALLEGES THAT THE SALE OF THE DRUG WAS MADE TO ROONEY. THE PROOF DISCLOSES THAT THE SALE WAS MADE TO NARCOTIC AGENT MOORE THROUGH THE AGENCY OF ROONEY. HENCE THERE IS A FATAL VARIANCE BETWEEN THE PROOF AND THE INDICTMENT.

The testimony relating to this Specification appears at pages 18 to 21 of the Transcript. The motion for verdict based thereon, the ruling of the court denying the motion, and the exception appear at pages 25 to 26 of the Transcript.

The proof shows without dispute that Narcotic Agent Moore sent Rooney to appellant's office to obtain the prescriptions described in both counts of the indictment (Tr. 18 to 21) and that Moore gave Rooney the money to pay for the prescriptions (Tr. 18 to 21). Moore took Rooney to the drug stores where Rooney had both prescriptions filled (Tr. 18 to 21). Moore gave Rooney the money to fill the prescriptions (Tr. 18 to 21). Rooney delivered to Moore the drug obtained on both prescriptions and Moore kept the drug in his possession until it was introduced in evidence at the trial of the case (Tr. 18 to 21). The indictment makes no mention of Moore. No conspiracy or criminal agency or attempt to commit the offense is alleged. Appellant is charged as a principal only, not *particeps criminis* (Tr. 1, 2, 3). The proof reveals that the drug was obtained by Moore through the agency of Rooney, but there is no allegation in the indictment of this proved fact.

Reverting to Specification of Error I, it is seen that the indictment is attacked because it does not allege that the prescriptions were filled. The error in this respect now becomes more apparent, because, while it does appear from the proof that the prescriptions were filled, nevertheless the proof discloses that Rooney had them filled for Moore.

It seems obvious that in drawing the indictment it was the purpose of the learned counsel for the government to circumscribe it with that exact concise-

ness which might render it impervious to demurrer, but at the same time leaving to chance its efficacy when measured by the proof. That the variance is fatal in the respect asserted seems obvious. Cf. Strader vs. U. S. (CCA 10) 72 Fed. (2nd) 589.

SPECIFICATION OF ERROR IV

THE TRIAL COURT ERRED IN CHARGING THE JURY IN THE EXACT LANGUAGE OF ARTICLE 85, SECTIONS 1 & 2, THEREBY CONFORMING APPELLANT'S PROFESSIONAL CONDUCT TO SUCH REGULATION, AND THEN BY CHARGING THE JURY THAT SAID REGULATION DID NOT PRECLUDE APPELLANT FROM PRESCRIBING A MODERATE AMOUNT OF THE DRUG IN ORDER TO RELIEVE A CONDITION INCIDENT TO ADDICTION BECAUSE (a) THE REGULATION IS VOID AND (b) THE INSTRUCTION IS CONTRADICTORY AND CONFLICTING.

The instruction appears at pages 32 to 34 of the Transcript and the objection to it and exception appear at page 52.

(a) The validity of Article 85, Sections 1 & 2, which the instruction quotes *in todidem verbis* (Tr. 32, 33) is discussed in Specification II of this brief. A repetition of the discussion will serve no useful purpose, but the court is respectfully requested to consider and apply it to this Specification of Error.

(b) The trial court had charged the jury that the Harrison Act itself permitted appellant to prescribe the drug if, repeating the language of the Act, it was prescribed "in the course of his professional con-

duct only" (Tr. 31). The trial court thus correctly conformed the charge to the Act itself. But the court proceeded farther and charged in the language of Article 85 (Tr. 32, 33). The learned trial judge apparently was not sure of his position and evidently sought to reconcile a regulation, doubtful as to its validity, with the Act itself by alternately charging the jury as follows:

> "The statute does not prescribe the disease for which morphine may be supplied. Regulation 85 in its provisions forbids the giving of a prescription to an addict or habitual user of narcotics not in the course of professional treatment, but for the purpose of providing him with a sufficient quantity to keep him comfortable by maintaining his customary use. Neither the statute *nor the regulations* precludes a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards." (Tr. 33, 34). (Italics ours)

A correct interpretation of Article 85, Sections 1 & 2, in their relation to the Act is indispensable to a correct decision of this case. It was necessarily erroneous therefore for the trial court to have left to the jury the solution of this important legal question. The regulation definitely inhibits the prescribing of the drug for the purpose of relieving a condition incident to addiction unless the addict is aged and infirm. The learned trial judge so charged the jury (Tr. 33) but then charged that the *regulation* did not preclude a physician from prescribing a moderate amount of the drug for the purpose of relieving a condition incident to addiction (Tr. 33, 34). The regulation and the instruction are antipodal. Appellant asserts that the regulation (Article 85, Sec-

tions 1 & 2) had no place in the charge at all because it is utterly void, but if it had then the instruction as a whole is contradictory and conflicting with respect to a serious and indispensable issue in the case. A familiar rule of law did not permit the trial court to relinquish its sole function in this respect and cast it over to the jury. The rule is stated as follows:

> "Where instructions give to the jury contradictory and conflicting rules for their guidance, which are unexplained, and following either of which would or might lead to different results, then the instructions are inherently defective and erroneous; and this is true, though one of the instructions correctly states the law as applicable to the facts of the case * * *." 14 R.C.L. (Instructions) Sec. 45, p. 777.

See Drosos vs. U. S. (CCA 8) 2 Fed. (2nd) 538;

Hurley vs. State, 22 Ariz. 211; 196 Pac. 159.

SPECIFICATION OF ERROR V

THE TRIAL COURT ERRED IN CHARGING THE JURY THAT (a) ONE OF THE OBJECTS OF THE HARRISON NARCOTIC ACT WAS INTENDED TO PREVENT THE GROWING USE OF NARCOTICS DEEMED A MENACE TO THE NATION BY CONGRESS, AND (b) THAT IF A PHYSICIAN COULD DISPENSE NARCOTICS NOT IN GOOD FAITH FOR THE RELIEF OF A PATIENT THEN THE MORAL OBJECT OF THE ACT IS ENTIRELY DEFEATED, AND (c) THAT APPELLANT COULD NOT PRESCRIBE THE

DRUG TO ROONEY TO RELIEVE A CONDITION INCIDENT TO ADDICTION.

The instruction appears at pages 37 and 38 of the Transcript, and the objection to it and exception appear at page 52.

(a, b) Under the Federal Constitution the Harrison Act must be justified as a revenue measure. An attempt to justify the Act as a moral measure, or to prevent the national menace of the growing use of narcotics, injects an unrelated prejudicial issue into the case and besides, as thus interpreted, subjects it to grave constitutional doubts. Linder vs. U. S. supra. In case of Nigro vs. U. S. (CCA 8) 7 Fed. (2nd) 553 (particularly pp. 559, 560, 561) an instruction approximating the one given here was condemned under the authority of the Linder case. While it may be conceded that the Act has an incidental moral or social aspect, nevertheless a charge pointing out to the jury these features of the Act, and that it was one of the objects of Congress in enacting it, had no proper place in the case and it necessarily prejudiced the jury. Although a contrary view was taken of the Act in the cases of Oliver vs. U. S. (CCA 4) 267 Fed. 544 and Traver vs. U. S. (CCA 3) 260 Fed. 923, it should be observed that those cases were decided before the Linder case. Assuming the Congress considered the menace to the nation resulting from the growing use of narcotics when the Act was passed, the Congress nevertheless attempted to avoid the constitutional limitation which the trial court failed to heed by justifying the Act as a revenue measure and thereby lift it from the category of a police regulation reserved to the states. Whatever may be the incidental purpose of the Act, the learned trial court interpreted it as a police regulation when

he *charged* the jury with respect to its moral aspect and the menacing effect of the growing use of narcotics.

No charge is fraught with more prejudice than the charge of violating the Harrison Narcotic Act. The suggestion of the moral purpose of the Act, and the menacing effect of the growing use of narcotics in connection with the dispensation of the drug, is anathema to a physician charged with a violation of the Act. When the trial judge emphasizes the moral features of the Act in charging the jury, whereas in strict legal justification there are none, the prejudicial effect is inescapable, and "calculated to be prejudicial." Vd. Nigro vs. U. S., supra, p. 561.

(c) The latter part of this instruction (Tr. 38) charged the jury that appellant, as a physician, could prescribe the drug in good faith only *to cure* illness or the narcotic habit. He was thereby deprived of the benefit of the right to prescribe morphine for Rooney *to relieve* a condition incident to addiction. The Harrison Act does not thus limit appellant in prescribing the drug for an addict and to restrict him in this manner is fundamental error. Linder vs. U. S., and Boyd vs. U. S., supra. If it may be assumed that the first part of this instruction worked no prejudicial harm upon appellant, assuredly the latter part of it committed him to his sure destruction.

The foregoing instruction definitely characterizes the Act as a police regulation. That power, of course, is reserved to the several states. Linder vs. U. S. supra. If, therefore the instruction correctly interprets the Act, then the Act is void, but if not, then the instruction is erroneous.

CONCLUSION

We respectfully assert that this cause originated upon an indictment legally insufficient and proceeded to judgment upon a record erroneous in the several particulars herein pointed out. The learned trial judge conducted the case upon the theory that the Harrison Narcotic Act is a police regulation rather than a revenue measure. Trial courts at times are inclined to interpret the Harrison Narcotic Act in a manner designed to accomplish a purpose desired, which, although commendable in purpose, nevertheless abandons the constitutional limitation within which the Act validly operates. The Supreme Court in the earlier cases encountered difficulty in applying the Act to the practice of physicians. Finally that court in the Linder case definitely clarified conflicting opinions respecting the operation of the Act upon physicians prescribing small doses of the drug for addicts, and confined the Act in such cases within a field which we submit the trial court failed to observe. Contrary to a prevalent notion the offense defined by the Harrison Act does not involve moral turpitude. Vd. Curran vs. U. S. (DCNY) 38 Fed. (2nd) 498.

This case stands upon a plane entirely different from one where the physician dispenses prescriptions for excessive and unnecessary quantities of the drug, thereby affording the opportunity of trafficking in it and evading the tax. Rooney was an addict of long standing. Appellant had no part in creating his unfortunate condition,—he merely prescribed a small quantity of the drug, after payment of the tax, to relieve a condition incident to the addiction. That does not justify, in our opinion, the double penalty which will inevitably follow the judgment, if sustained.

For the reasons herein set forth we respectfully urge that the order of the trial court overruling the demurrers to the indictment be reversed with directions to sustain the demurrers; or, if it is concluded that the trial court did not err in this respect, then that the judgment be reversed upon the remaining errors assigned and the case remanded for new trial.

Respectfully submitted,

LESLIE C. HARDY,
Attorney for Appellant,

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Phoenix, Arizona.

No. 7908

United States
Circuit Court of Appeals
For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

BRIEF OF APPELLEE

F. E. FLYNN,
United States Attorney.
K. BERRY PETERSON,
Assistant United States Attorney.
Attorneys for Appellee.

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

For the purpose of appellee's brief, the statement of the case as found in appellant's brief (pp 1, 2, 3) is here adopted. Appellee desires, however, to point out proof disclosed is proof only in part (See Tr. pp 18, 20).

ARGUMENT

For the purpose of argument, appellee adopts the order of the specifications that are assigned by the appellant (Appellant's Brief, pp 4, 5, 6, 7, 8, 9).

I.

THE SUFFICIENCY OF THE INDICTMENT

Appellant's first proposition is:

That neither count of the indictment alleges that the prescription mentioned was filled, or that Rooney obtained a drug thereon, or at all, and that the indictment did not disclose that the appellant committed the offense of depriving the Government of revenue as provided by the Harrison Narcotic Act.

Appellant is in error when he contends that there is no allegation that the prescriptions mentioned in the indictment were filled. The wording of both counts, 1 and 2, of the indictment is as follows: That the appellant "did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away, certain derivatives and salts of opium, to-wit, 4 grains of morphine sulphate, to one Pat Rooney, alias Fred Humphrey" by means of a prescription issued and dispensed to the said Pat Rooney, "and that the said Pat Rooney, alias Fred Humphrey, was not then and there a patient of the said Claude Emerson DuVall, and the said morphine sulphate was dispensed and distributed by the said Claude Emerson DuVall not in the course of his professional practice." (Tr. pp 2, 3).

The indictment does not allege specifically that

the person to whom the prescriptions were issued actually had them filled, because such an allegation is unnecessary. The allegation of a sale implies a completed act and when it is said there is a sale through a prescription it is, in effect, said that the prescription was filled.

Mitchell v. *U. S.* (CCA6) F. (2) 514.

Jin Fuey Moy v. *U. S.* 254 U. S. 189.

The cases cited in appellant's brief are not applicable to the present case. In both *Aiton* v. *U. S.* and *Strader* v. *U. S.* (Appellant's brief p. 9), the indictments charge the issuing of prescriptions with intent to sell and barter narcotic drugs. In other words, the essence of the charge was the issuing of the prescriptions. In the present case the charge is specifically that a sale was made by means of a prescription not to a patient and not in the course of his professional practice only. In the case of *Linder* v. *U. S.*, 268 U. S. 5, cited in appellant's brief (p 11), with reference to the indictment in that case, the Supreme Court said:

> "It does not question the doctor's good faith, nor the wisdom or propriety of his action according to medical standards. It does not allege that he dispensed the drugs otherwise than to a patient or for other than medical purposes".

Appellee contends that in the present case the indictment charges the completed act of a sale to the person, not a patient of the appellant, and not in the course of his professional practice only, and does question the good faith of the appellant.

Appellant contends that the indictment does not disclose that appellant committed the offense of depriving the Government of revenue, as provided by the Harrison Narcotic Act, and that the small amount of the drug prescribed, negatives the conclusion that the appellant had a purpose of evasion of the payment of the tax required by the Harrison Narcotic Act. It is not necessary, to sustain a conviction under the Harrison Act, Section 2, that there be alleged or proven the Government was defrauded of revenue.

Bush v. *U. S.* (CCA5) 16 F. (2) 709.

Barbot v. *U. S.* (CCA4) 273 Fed. 919.

The amount of the drug charged in the indictment does not permit any conclusion by the appellant relative to his guilt or innocence. An indictment for a violation of the Harrison Narcotic Act may be predicated upon a single sale.

Hosier v. *U. S.* (CCA4) 260 Fed. 155.

Also, the sufficiency of the evidence has not been questioned by appellant, and whether or not the sale charged in the present indictment was for a large amount is not debatable at this time. The entire question involved is whether or not the appellant made the sale as a physician, by the issuing of the prescriptions charged, in good faith, to a patient, in the course of his professional practice only. The jury has found that the sale was not made in good faith and not in the course of his professional practice. This question is a matter for the jury to determine.

Hoyt v. *U. S.* (CCA 2), 273 Fed. 792.

Bush v. *U. S.* (CCA 5) 16 F (2) 709.

Appellee contends that the indictment is not defective and that it charges a violation of Section 696, Title 26, U. S. C. A.

II.

THE HYPOTHETICAL QUESTION PROPOUNDED TO A GOVERNMENT WITNESS

The hypothetical question propounded to Dr. Townsend, a Government witness, did not exclude the prescribing of morphine by appellant to Rooney, who was an addict, not suffering with an incurable disease. The question propounded was predicated on the good faith of the appellant in selling to the witness Rooney the narcotics in question, and was not predicated on Exception 1 of Article 85. So far as the record discloses, the witness Rooney was not suffering from any disease other than the addiction of morphine, and the question propounded was based upon the proposition that the appellant in making the sale by a prescription endorsed upon it "Article 85, Exception 1", (Tr. p 19), thereby adopting the regulations of Article 85, Exception 1, as his purpose in giving the prescriptions. The question propounded did not rest upon the assumption as to whether or not the appellant had complied with the provisions of Article 85, Exception 1, but upon the assumed circumstances as disclosed by the evidence in the case. It was not based upon the validity of Exception 1 of Article 85, but upon the assumed facts that a known addict had received from the appellant a prescription, upon which he had written that the prescription was given under the provisions of the exception heretofore mentioned, whereas the

proof was otherwise. There was in the question no indication that the appellant had no right to administer morphine for any disease. providing he did so in the course of his professional practice. Appellant's further argument relative to the question of personal attendance, has no bearing either upon the hypothetical question or the facts in the present case. This question did not arise. The Court carefully instructed the jury on the purposes of hypothetical questions. (Tr. pp 47, 48, 49).

III.

THE VARIANCE OF PROOF BETWEEN THE INDICTMENT AND THE ALLEGATION OF SALE

Appellant contends that while the indictment charges a sale to Rooney, the proof shows that the sale was actually made to Agent Moore. This is not the case. The indictment charges the sale to Rooney in both counts, and the proof disclosed that the prescriptions, by which the sale was made, were written for and given to the witness Rooney and he later obtained possession of the drugs on these prescriptions, and after the completed act of the sale, which was completed by his receiving the narcotics from the drug store filling the prescriptions, he delivered them to Agent Moore. The act of sale was completed at the time of the delivery of the narcotics to the witness Rooney. What became of the drugs after the completion of that sale was not material for the purpose of the indictment. They are material, as a matter of proof, to show that the drugs received were narcotic drugs as charged in the indictment. If the indictment

had charged that the sale was made to Agent Moore, unquestionably appellant would be here before this Court, or would have appeared before the lower Court, contending otherwise, that the sale was actually made to the witness Rooney to whom the prescriptions were given. Appellee contends that there is no variance in respect to the allegations contained in the indictment and the proof disclosed.

IV.

ERROR OF THE COURT IN CHARGING THE JURY WITH RESPECT TO ARTICLE 85, SECTIONS 1 AND 2

Appellant contends that the Court erred in instructing the jury relative to Article 85, Sections 1 and 2, because the regulation is void and that the instruction was contradictory and conflicting.

The instruction here questioned, (Tr. pp 32, 33, 34) is not conflicting. Certain testimony relative to Article 85 and the exceptions was introduced (Tr. p 19) and the Court, after instructing the jury as to these provisions, said:

> "Neither the statute nor the regulations preclude a physician from giving an addict a moderate amount of drugs in order to relieve a condition incident to addiction, if the physician acts in good faith and in accord with fair medical standards." (Tr. pp 33, 34).

What the Court actually did was to set aside the provisions of Article 85 and the exceptions thereto,

and adopt the rule as given by the Supreme Court in the *Linder* case.

Linder v. U. S. 268 U. S. 5, 22.

> "Instructions must be taken as an entirety, that is, each must be considered in connection with others of the series referring to the same subject and connected therewith, and if, when taken together, they properly express the law as applicable to the particular case, no just ground of complaint exists, even though an isolated and detached clause is, in itself, inaccurate or incomplete, and although some of them taken separately may be subject to criticism. * * * " 14 R. C. L. 817 (Instructions).

We urge that the instructions read in their entirety correctly state the law applicable to this particular case.

V.

ERROR OF THE TRIAL COURT IN CHARGING ON THE OBJECT OF THE HARRISON NARCOTIC ACT

The instruction complained of is as follows:

> "The good faith of the defendant treating the witness, Pat Rooney, as a physician, for the purpose of curing him from the narcotic habit is an important issue involved in this case. One of the objects of the Narcotic Act was no doubt intended to prevent the growing use of these narcotics deem-

ed a menace to the nation by Congress. If a physician and the others mentioned in the exceptions could sell and dispense these narcotics regardless of the fact whether it be done in good faith for the relief of a patient, then the moral object of the Act is entirely defeated, *notwithstanding the fact that it is primarily a revenue measure.* It cannot be claimed that a physician selling and dispensing these narcotics through a prescription, or otherwise, not in good faith for the purpose of securing the cure of one suffering from an illness, or to cure him from the narcotic habit, is doing so in the course of his professional practice only as prescribed by the express language of the Act." (Italics ours). (Tr. pp 37, 38).

We contend it is not prejudicial. Unquestionably there is a moral aspect to every law. The Trial Court here instructed that the Harrison Narcotic Act was primarily a revenue law but, incidental to the primary purpose, there was a moral object. In the *Nigro* case, quoted in appellant's brief (p 20), the instruction, was as follows:

"The Harrison Anti-Narcotic Law, the court should explain to you, is a law enacted by the American Congress, and the purpose of that law is to collect revenue for the government as a primary proposition, and as a secondary proposition the design and object of the law is to restrict, and to prohibit in a measure, the promiscuous traffic in what is known as narcotic drugs in this country. The traffic in narcotic drugs, or habit-forming drugs, has been of such nature that Congress felt the need of a law that would not only aid in gather-

ing revenue from such traffic, but in a suppression of such traffic in so far as it was designed for the purpose solely and alone of feeding the appetite of those who were addicted to the use of such drugs."

And again the court said:

"The Congress, in enacting a law for the taxing of such drug, or the traffic therein, and in seeking to limit or restrict such traffic, has provided that no person shall deal in such drugs," etc.

In this instruction the trial Court emphasized the incidental and moral purpose of the Act to the extent of almost obscuring the primary purpose of the Act. Even then the Circuit Court, although indicating disapproval of the instruction, did not deem such an expression as reversible error.

"What effect the statement to the jury that the secondary object of the law is to restrict, and prohibit in a measure, traffic in narcotic drugs, may have had upon the jury in the particular case, we cannot tell, and in view of the whole charge of the court it is probably doubtful that it had any controlling effect, and this court would not be in the particular instance inclined to reverse, if there were no other prejudicial errors on the face of the record."

Nigro v. *U. S.* (CCA 8) 7 F (2) 553.

In the case of *Traver* v. *U. S.* cited in appellant's brief (p 20), the Trial Court instructed that the clear

purpose of the Act was to restrict the distribution and use of opium and its derivatives to medical purposes only. There the Appellate Court said:

> "It is assuredly within the discretion of a trial judge, in charging a jury, to state the purpose, as he conceives it, that Congress had in passing any given act. If an erroneous statement of such a purpose may be considered reversible error in any case, we are entirely clear that, although the Harrison Act was passed pursuant to the taxing power of Congress and is clothed in the garb of a revenue act, the learned trial judge did not misconceive or misstate the broad underlying purpose which Congress had in passing it * * * *, and therefore that no harm was done the defendant by the statement in question."

Traver v. *U. S.* (CCA 3) 260 Fed. 923.

From this decision a writ of certiorari was taken to the Supreme Court and there denied. (251 U. S. 555).

A similar instruction was upheld by the Circuit Court of Appeals of the Fourth Circuit.

Oliver v. *U. S.* 267 Fed. 544-546.

We respectively submit that this instruction, read in the light of the Trial Court's entire charge, was not improper.

CONCLUSION

Upon a valid indictment, appellant was given a fair

and impartial trial and, upon competent evidence the sufficiency of which has not been questioned, was found guilty. We submit, therefore, that the judgment should be affirmed.

F. E. FLYNN,
United States Attorney.

K. BERRY PETERSON,
Assistant United States Attorney.
Attorneys for Appellee.

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No. 7908

United States
Circuit Court of Appeals
For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Appellant,

vs.

UNITED STATES OF AMERICA
Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
DISTRICT OF ARIZONA

LESLIE C. HARDY,
OTTO E. MYRLAND,
Attorneys for Appellant.

No. 7908

United States
Circuit Court of Appeals
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CLAUDE EMERSON DuVALL,
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UNITED STATES OF AMERICA
Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

QUESTION PRESENTED

The hypothetical question propounded by the Government's counsel to their expert witness, Doctor Townsend, (Abs. Rec. page 22 et seq.) calls for an opinion of said expert upon the ultimate issue to be determined by the jury, towit: the good faith of the defendant and if such prescription was issued in the professional practice only of such defendant and constitutes reversible error.

ARGUMENT

In a case charging a physician with a violation of Section 696 of Title 26 United States Code, the ultimate issue for the jury to determine is whether the prescription issued and dispensed by said physician was issued to a patient in the course of his professional practice only.

This ultimate issue, like the ultimate issue in every case, must be decided by the jury upon all the evidence in obedience to the Judge's instructions as to the legal meaning of all crucial phrases, other questions of law, such as the credibility of witnesses, burden of proof, reasonable doubt, weight of the testimony, etc.

To permit any witness, expert or non-expert, to give his opinion on the ultimate issue to be decided by the jury, is an invasion of the province of the jury and a deprivation to the defendant of his right to have the jury determine this ultimate fact from evidentiary matter and not from opinions of experts.

That this in the rule of law in this jurisdiction is too clear for argument. This Honorable Court in the case of U. S. vs. Stephens, 73 Federal Second 695, reversed a judgment of a District Court because a hypothetical question propounded to a medical witness asked for his opinion as to the ultimate fact in the case and therefore invaded the province of the jury.

Other Circuit Courts of Appeal have followed this rule of law.

U. S. vs. Bass (C. C. A. 7) 64 Federal (2) 467.

U. S. vs. Sauls (C. C. A. 4) 65 Federal (2) 886.

Hamilton vs. U. S. (C. C. A. 5) 73 Federal (2) 357.

U. S. vs. Steadman (C. C. A. 10) 73 Federal (2) 706.

On January 7, 1935, the Supreme Court of the United States in the case entitled U. S. vs. Spaulding, Volume 79

Law Edition page 251, (Advance Opinions) reversed a judgment of the Fifth Circuit Court of Appeals sustaining a judgment of the District Court of the United States for the Northern District of Florida on the ground that expert medical witnesses had been asked and permitted to state their conclusions on the whole case. That Honorable Court said:

> "It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as the meaning of the crucial phrase and other questions of law. The experts ought not to have been asked or allowed to state their conclusions on the whole case."

Defense counsel admit that the above cases were civil suits on War Risk Insurance policies. The rule of law should be and is the same in civil suits of every nature. The rules governing the admissability of opinion and expert testimony are the same in Criminal Cases as in Civil Cases.

16 C. J. 747, Section 1532.

Jones on Evidence, Section 1321.

Underhill's Criminal Evidence, Section 185-187.

The desireability of keeping expert testimony within proper bounds is especially manifest in criminal cases where the life or liberty of the accused is at stake.

16 C. J. 747, Section 1532.

People vs. Vanderhoof, 71 Mich. 158, 39 NW 28.

It is also recognized that expert opinion predicated on hypothetical questions is particularly objectionable. This is so because hypothetical questions can be framed, and usually are framed, in a manner that the answer of the expert can only be the answer desired by the proponent of the question. Most hypothetical questions fail to contain all of the facts and fail to recognize the true rules of law

involved in the case. This is illustrated by the hypothetical question involved in the instant case. It fails to contain any reference to the rule of law contained in the Linder case, which recognizes that there are ills incident to addiction and that addiction itself is a disease. It is predicated solely on Art. 85 Exceptions 1 and 2.

Defense counsel admit that the jury was entitled to expert testimony with respect to recognized medical standards and methods of treating patients such as Pat Rooney. Such testimony would be an evidentiary fact, which, with all the evidence of the case, considered in obedience to the Judge's instructions as to the law, would enable it to decide the ultimate issue. However, the answer to this hypothetical question is only that particular physician's idea of the proper treatment of addicts and does not purport, unless it is considered to do so by inference, to inform the jury as to the recognized medical standards and methods of treating patients such as Pat Rooney.

The issues in the instant case "can be fully tried by presenting all the facts to the jury, and by confining the physicians to simple opinions on matters strictly within their province, not extending them to the complex conclusion to be reached by the jury."

Hamilton vs. U. S. (C. C. A. 5) 73 Federal (2) 357-359.

The hypothetical question in calling for a conclusion from the expert on the ultimate fact to be found by the jury clearly usurped the duty of the jury, was an invasion of its sole province and is reversible error.

Respectfully submitted,

LESLIE C. HARDY,
OTTO E. MYRLAND,
Attorneys for Appellant.

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No. 7908

IN THE

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For the Ninth Circuit

CLAUDE EMERSON DuVALL,
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vs.

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Appellee.

APPELLANT'S PETITION FOR A REHEARING
AND
APPLICATION FOR STAY OF ISSUANCE
OF MANDATE

LESLIE C. HARDY,
422 Professional Bldg.,
Phoenix, Arizona.

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IN THE

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CLAUDE EMERSON DuVALL,
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vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING AND APPLICATION FOR STAY OF ISSUANCE OF MANDATE

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the Circuit Court of Appeals for the Ninth Circuit:

The appellant herein respectfully petitions this Honorable Court for a rehearing of this cause, and for grounds thereof says:

I.

The Court erred in holding that the hypothetical question propounded to Dr. Townsend (Tr. 22, 23) and answered by him in the negative did not constitute prejudicial error.

ARGUMENT

(a) At the outset may we request that the omission of counsel to point out to the Court reasons why this unassigned error should be considered be not permitted to militate against appellant. We had thought, since the Court itself suggested the possibility of error, that we were only put to the duty of pointing out the error and not the reasons why the Court should consider it.

(b) In the opinion this Court says:

> "The element of good faith in the case at bar is essentially one of criminal intent, and exclusively for the determination of the jury." (Op. p. 7).

This element was incorporated in the question and answered by the witness-physician unfavorably to appellant. It is true that appellant indorsed upon the prescriptions the words "Article 85, Exception 1" but under the regulation he had no other alternative. His prescribing of morphine was limited to the purposes allowed by the Regulation. He did add on the prescriptions "Use as needed for relief of pain." The validity of the Regulation is therefore directly involved.

We submit that if appellant had the right to prescribe morphine for the relief of a condition incident to addiction (Linder vs. U. S., 268 U. S. 5) then because he indorsed upon the prescriptions a notation pertaining to the Regulation ought not in any wise deprive him of that right. The Commissioner left him no other alternative.

That appellant was prescribing for addiction is evident. (This is confirmed by the hypothetical question, Tr. p. 23; and the testimony of Rooney, pps. 18, 19, 20.)

Appellant was entitled to prescribe morphine for Rooney, who was a chronic morphine addict, to relieve his condition incident to the addiction, so long as unreasonable quantities were not prescribed regardless of whether appellant was treating Rooney for disease or addiction. Linder vs. U. S. supra. Therefore the question, by confining him to the Regulation, deprived him of a right which was error to take away from him.

We respectfully request that if the Court is impressed with the contention that appellant could prescribe the drug in question *to relieve* a condition incident to addiction, that then it reconsider its opinion in the respects here mentioned. At least, it seems to us, whether or no the entire evidence is incorporated in the record, sufficient appears to warrant a consideration of this element in the case measured by Linder vs. U. S., supra.

Respectfully submitted,

LESLIE C. HARDY,
Attorney for Appellant.

No. 7908

In The
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In the event appellant's Petition for Rehearing is denied appellant respectfully prays that this Court stay the issuance of the mandate from this Court pending the presentation and determination of a Petition for Writ of Certiorari to the Supreme Court of the United States, which Petition is now filed and pending in said Court.

In further support of this Application, there is attached the affidavit of the appellant herein, and there is filed herewith a copy of said Petition for Writ of Certiorari and the Brief in Support thereof, all of which appellant respectfully requests may be considered a part hereof.

Dated at Tucson, Arizona, this 16th day of March, 1936.

LESLIE C. HARDY,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I, Leslie C. Hardy, Counsel for the appellant herein, do certify that in his opinion the foregoing Petition for Rehearing is well founded and meritorious and that neither said Petition or said Application For Stay of Issuance of Mandate are interposed for the purpose of delay.

Dated at Tucson, Arizona, this 16th day of March, 1936.

LESLIE C. HARDY,
Attorney for Appellant.

No. 7908

In The
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth Circuit

CLAUDE EMERSON DuVALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

AFFIDAVIT OF CLAUDE EMERSON DuVALL, APPELLANT, IN SUPPORT OF APPLICATION FOR STAY OF ISSUANCE OF MANDATE

United States of America }
State of Arizona } ss.
County of Pima }

Claude Emerson DuVall, first being sworn, upon oath deposes and says:

That he is the appellant herein and he makes and files this affidavit in support of his Application For Stay of Issuance of Mandate herein.

Affiant deposes and says that he, through his counsel, Leslie C. Hardy, Esq., has filed in the Supreme Court of the United States a Petition for Writ of Certiorari to review the decision of this Court rendered and filed herein on March 2, 1936.

Affiant further deposes and says that said Petition for Writ of Certiorari is not interposed for the purpose of delay but that it is interposed solely in order that affiant may invoke the rights and remedies accorded to him by the Constitution and Laws of the United States in an effort to preserve his liberty.

(Sgd) Claude Emerson Hewall

Subscribed and sworn to before me this 23rd day of March, 1936.

(Sgd) M. W. Johnston

Notary Public.

My Commission expires:

Aug. 7th 1936

(Seal)

Service of two (2) copies of the within Petition for Rehearing and Stay of Issuance of Mandate admitted this.....day of March, 1936.

FRANK E. FLYNN,
U. S. Attorney.

By.....